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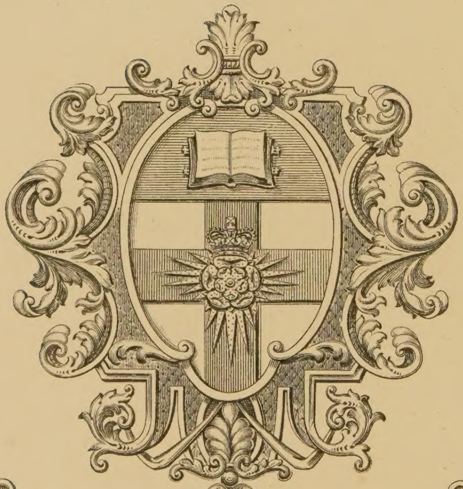

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1941.

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AND ON APPEAL THEREFROM IN THE

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CASES

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KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

BOWMAKER, LIMITED *v.* TABOR.

C. A.

1941

March 28;
April 8.

Emergency legislation—Hire-purchase agreement—Payments in arrear—Seizure of car with consent of holder without leave of court first obtained—Validity of seizure—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (ii.).

By s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, "A person shall not be entitled, except with the leave of the "appropriate court,—(*a*) to proceed to exercise any remedy which "is available to him by way of . . . . (ii.) the taking of possession "of any property. . . . ."

The defendant, having fallen into arrears in the payment of instalments under an agreement for the hire-purchase of a motor-car, at the request of an agent of the owners of the car, signed a statement that "it is my desire voluntarily to terminate the "hiring . . . . and to surrender the vehicle concerned." In an action by the owners for the arrears, the defendant counter-claimed damages on the ground that the owners had retaken the car without obtaining the leave of the court under the sub-section. The owners contended that the sub-section did not apply as the defendant had consented to the taking of the car:—

Held, that the leave rendered necessary by the sub-section could not be dispensed with by either contract with or waiver by the holder of the property of which it was sought to take possession, and that, therefore, the defendant was entitled to succeed.

C. A.

1941

BOWMAKER, LD. v. TABOR.

APPEAL from Bow County Court.

The plaintiffs, before the passing of the Courts (Emergency Powers) Act, 1939, let to the defendant on hire-purchase terms a motor-car, the purchase price of which was 443*l.* 10*s.* 6*d.* payable by a first instalment of 88*l.* 2*s.* 6*d.* and twenty-four monthly instalments of 14*l.* 16*s.* 2*d.* After the defendant had paid altogether 268*l.* 0*s.* 10*d.*, he became in arrear, in March, 1940, in the sum of 64*l.* 0*s.* 4*d.* One Nye, the plaintiffs' representative, called on him and asked if he could make any suggestion about payment. None was forthcoming, and Nye said that he had better return the car, and produced a typewritten form which set out " I hereby declare that it "is my desire voluntarily to terminate the hiring under the "above hire purchase agreement, and to surrender the vehicle "concerned." This the defendant signed, and the plaintiffs retook possession of the car.

In the present action the plaintiffs claimed the 64*l.* 0*s.* 4*d.* arrears. By his defence, the defendant alleged that Nye promised that, if he signed the agreement put before him by Nye, the arrears would be forgiven, but this defence failed. He also counter-claimed damages on the ground that the plaintiffs had retaken the car without obtaining the leave of the court under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939. The plaintiffs contended that the subsection did not apply as the defendant had consented to the taking of the car.

By clause 3 (*b*) of the hire-purchase agreement the hirer might at any time determine the hiring by returning the vehicle at his own risk and cost to the owners in good condition and repair, together with the registration book, licence and insurance certificate. By clause 4, the plaintiffs were empowered to seize the car if the defendant was in arrears with his payments. By clause 5, whether the car was returned under clause 3 (*b*) or taken under clause 4, the defendant remained liable for arrears of rent.

The county court judge, while holding that the defendant signed the document put before him by Nye because he felt that he could not keep up the instalments and knew what

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1941
BOWMAKER, LD.
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bargain he wanted and got it, decided the counterclaim in the defendant's favour by reason of the decision of Farwell J. in *Soho Square Syndicate* v. *E. Pollard & Co., Ld.* (1), that the Act precluded contracting out of or waiver of its provisions, and awarded damages. The plaintiffs, defendants on the counterclaim, appealed.

W. Harvey Moore for the appellants. The county court judge was wrong in holding that there could not be a contracting out of or waiver of the provisions of the Act of 1939. In so holding he followed the decision of Farwell J. in *Soho Square Syndicate* v. *E. Pollard & Co., Ld.* (1), but, in view of the finding in that case that the consent of the syndicate had not been obtained, Farwell J.'s judgment on this point was obiter. Sect. 1, sub-s. 2, of the Act of 1939, is not applicable here, because the appellants were not exercising a remedy within the meaning of the sub-section, but the defendant was exercising his own right under clause 3 (*b*) of the agreement of determining it by returning the car. It was not the exercise of an adverse power like that which Farwell J. had in mind in deciding *Soho Square Syndicate* v. *E. Pollard & Co., Ld.* (1). In *In re Sandow* (2) Sargant J., referring to the Courts (Emergency Powers) Acts of 1914 and 1916, which are substantially the same as the present Act, said that they conferred a personal right which might be waived. The statute contains no prohibition against contracting out, the consideration for which is the release of the hirer from liabilities connected with the possession of the property, such as garage rent, bombing, etc.

[GODDARD L.J. This in fact was a resumption of possession by the appellants under clause 4 of the agreement with the respondent's consent, and not a return of the car under clause 3 (*b*).]

In *Salford Guardians* v. *Dewhurst* (3) it was held that a board of guardians and their employees could not contract out of the Poor Law Officers Superannuation Acts, 1896 and 1897,

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(1) [1940] Ch. 638.
(2) [1916] W. N. 262.
(3) [1926] A. C. 619.

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but that was on the construction of those Acts, and Lord Sumner dissented.

H. H. Harris for the respondent was not called on to argue. He referred to *Barton* v. *Fincham* (1).

Cur. adv. vult.

1941. Apr. 8. The following judgment was read.

Goddard L.J. [after stating the facts :] Before us the first point taken for the plaintiffs was that, by signing the form referred to, the defendant exercised his right under clause 3 (*b*), and, therefore, the Courts (Emergency Powers) Act, 1939, had no application. If that were the case, this contention would no doubt be sound. There is nothing in the Act to prevent a hirer returning goods he has hired without the leave of the Court. Sect. 1, sub-s. 2, is aimed at preventing the owner from exercising any remedy he may have by way of taking possession of property, without the leave of the Court. Now the learned judge could not have held that the defendant exercised his option and returned the car under clause 3 (*b*), because, if he had, there would have been no point in his reference to Farwell J.'s decision in *Soho Square Syndicate* v. *E. Pollard & Co., Ld.* (2), and it is abundantly clear that there was no evidence on which he could so have found. For clause 3 to operate the hirer must return the car at his own risk and cost to such address as the owner may appoint with the relevant documents, and the sub-section obviously contemplates a state of things wholly different from what took place here. That clause neither contemplates nor is applicable to the giving up of the car under the terms of the document which the defendant signed. It may be true that in one sense the car was given up voluntarily, but what it really amounts to is that the defendant assented to the owners exercising their right to retake it.

The question then arises whether, if the parties so agree, they can dispense with the necessity of the owners obtaining the leave of the Court to the retaking of the property in question. In other words, can the parties contract out of the provisions of the Courts (Emergency Powers) Act, 1939, or can the defendant effectively waive his right to object that the property has been taken without the leave of the Court? We have very little doubt that the document which the defendant was given to sign, and which he did sign, was drafted for the express purpose of endeavouring to avoid the necessity of applying to the Court, and if it does achieve that object it is obvious that there is a loophole in the Act of which not only hire-purchase dealers, but also others to whom the various remedies of self-help dealt with in sub-s. 2 are available, will not be slow to take advantage. Tenants who are behind with their rent, borrowers, and purchasers on hire-purchase terms who cannot keep up their instalments are in no position to bargain with their landlords and creditors, and for one who knows of the Courts (Emergency Powers) Act, there are probably scores who have never heard of it. It is entirely fallacious to say that everyone is presumed to know the law. That fallacy was exposed once and for all by Lord Mansfield in *Jones* v. *Randall* (1), when he said: "it would "be very hard upon the profession, if the law was so certain, "that everybody knew it; the misfortune is that it is so "uncertain, that it costs much money to know what it is, "even in the last resort." Then in *Martindale* v. *Falkner* (2), Maule J. said: "There is no presumption in this country that "every person knows the law: it would be contrary to "common sense and reason if it were so." After citing *Jones* v. *Randall* (1), the learned judge went on to say (3): "The "rule is, that ignorance of the law shall not excuse a "man, or relieve him from the consequences of a crime, "or from liability upon a contract." This judgment was cited with approval by Blackburn J. in *Reg.* v. *Tewkesbury Corporation* (4).

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(1) [1921] 2 K. B. 291.

(2) [1940] Ch. 638.

The present case appears to us to be one of an attempt not to contract out of the Act, but to waive its provisions. The document signed by the defendant is not, in our opinion,

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(1) (1774) 1 Cowp. 37, 40.
(2) (1846) 2 C. B. 706, 719.
(3) 2 C. B. 720.
(4) (1868) L. R. 3 Q. B. 629, 635.

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contractual, that is to say, it does not appear that the parties meant to make a contract that the Act should not apply to the already existing agreement of hire-purchase. It is no more than a consent by the defendant to the plaintiffs' exercising a right of seizure which the hire purchase agreement already gave them. But we do not think that anything turns on this, as whether it be a case of contracting out or of waiver the same principles apply. The maxim which sanctions the non-observance of a statutory provision is cuilibet licet renuntiare juri pro se introducto. Everyone may waive the advantage of a law made solely for the benefit or protection of him as an individual in his private capacity, but this cannot be done if the waiver would infringe a public right or public policy: see *MacAllister* v. *Bishop of Rochester* (1). A good illustration of a protection that can be waived is afforded by the Statute of Limitations which a debtor can waive if he chooses: *East India Co.* v. *Paul* (2).

So, it is necessary to consider in the first place exactly what is the operation of the Act of 1939. It does not in terms confer a benefit or protection on the debtor. What it does is to restrain a creditor under a pre-war contract from enforcing his remedies, whether under a judgment, or under an agreement, or, in the case of a distress, under the common law, without the leave of the Court. The result may be, and perhaps in the majority of cases is, to confer a measure of protection on the debtor, but this by no means follows, as the Court may and often does give the creditor leave to proceed unconditionally. The terms of the Act are peremptory, and there is certainly nothing in it to suggest that the Legislature contemplated that an application to the Court might be dispensed with in any circumstances. Even if the debtor does not appear on the hearing of the application to show that his inability to pay arose out of circumstances due to the war, it might well be that the Court could see that there were such circumstances, for instance, if, in the case of the hire purchase of furniture, the debtor were a private soldier on active service. Suppose it appeared that he had paid all

(1) (1880) 5 C. P. D. 194.

(2) (1849) 7 Moo. (P. C.) 85.

but the last two instalments and then had been called up for service, the Court would, we think, be bound to refuse leave to seize until it could be satisfied that it was proper to permit it, and then might give leave to seize only a proportion of the goods. At any rate, by making it obligatory on the creditor to apply to the Court the Act at least gives the latter the power to protect the debtor against himself. We share the difficulty felt by Farwell J. in *Soho Square Syndicate* v. *E. Pollard & Co., Ld.* (1), and perhaps in a greater degree than he did, in seeing how, when a statute takes away from a person a power or a right, it can be revested in him by the consent of the other party. If the Act had placed the onus on the debtor of applying for relief, it might very well be that different considerations would obtain, but Parliament has deliberately restrained the creditor from proceeding until the leave of the Court has been obtained by him, and we see no warrant for holding that the consent of the debtor can relieve the creditor of that obligation. It seems to us that it is just because debtors may be ignorant of the provisions of the Act that the legislature has enacted that the creditor must obtain leave to proceed and has not put the burden on the debtor of seeking to restrain him. If one class of creditor can, by obtaining the consent of his debtor, avoid the necessity of applying to the Court, so can all classes, and we entirely agree with Farwell J. in thinking that this would conflict with the obvious policy which Parliament had in mind and need not repeat the weighty reasons that he gave for so deciding.

But there is one other matter which is worth consideration. If contracting out or waiver is permitted, it will be open to judgment creditors to proceed to execution if they can extract a consent from the debtor. Now this Court has held in *A.* v. *B.* (2) and the Courts (Emergency Powers) Amendment Act, 1940, by s. 2, sub-s. 1, has expressly recognized, that in considering whether leave should be given, regard must be had to all the liabilities of the debtor. The Court must not, by giving leave to proceed in full to the creditor who has got in first, put it out of the debtor's power to pay something to other creditors. It must, to use the words of Scott L.J., endeavour to do a measure of distributive justice. This might well become impossible if a creditor, in a position to exercise pressure, could induce the debtor to agree that the Act should not apply in the case of his debt. This seems to us to be another good reason for holding that consent cannot dispense with the necessity of an application to the Court.

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(1) [1940] Ch. 638, 642.

(2) [1940] 1 K. B. 217.

Our attention was called to two cases decided under the Courts (Emergency Powers) Act, 1914. In the first, *In re Sandow, Ld.* (1), Sargant J. expressed the opinion that the necessity of obtaining the leave of the Court could be dispensed with by consent, but the point was not argued, as the application was ex parte. In another case, referred to in the Annual Practice (2), it is said that Atkin J. held that the necessity for obtaining leave to distrain could be avoided by consent of the tenant. These cases are not binding on this Court, and there is no authority binding us on the subject. In our opinion, neither contract nor waiver will excuse a creditor from observing the provisions of the Act.

There is one matter which we think should be noticed, though it was not directly raised in argument. Can it be said that, although performance of the obligation cast on the owners by the statute cannot be waived, yet, as the hirer must here, on the findings of the learned judge, be regarded as having consented to the seizure, he cannot be entitled to damages ? In other words, does the doctrine of "volenti non "fit injuria" apply ? We think this is answered by the decision of this Court in *Thomas* v. *Quartermaine* (3), where it was held that this maxim does not apply where there has been a disregard of an obligation imposed by statute. That case was considered and followed by the Divisional Court in *Baddeley* v. *Earl Granville* (4), where Wills J. said : "As to the result "of past breaches of the obligation" (i.e., one imposed by statute) "people may come to what agreements they like ;

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(1) [1916] W. N. 262, 263.
(2) Unreported. *See* [1940] Ch. 643.
(3) (1887) 18 Q. B. D. 685.
(4) (1887) 19 Q. B. D. 423, 426.

"but as to future breaches of it, there ought to be no "encouragement given to the making of an agreement between "A and B. that B. shall be at liberty to break the law which "has been passed for the protection of A. Such an agreement "might be illegal, though I do not hold as a matter of law that "it would be so. But it seems to me that if the supposed "agreement . . . . in consequence of which the principle of "volenti non fit injuria is sought to be applied, comes to this, "that the master employs the servant on the terms that the "latter shall waive the breach by the master of an obligation "imposed on him by statute, and shall connive at his disregard "of the statutory obligation imposed on him for the benefit "of others, as well as of himself, such an agreement would be "in violation of public policy and ought not to be listened to." While that case arose under the Employers' Liability Act, 1880, and the facts were, of course, very different to those in the present case, the principle laid down is clear and can well be applied here. If the person whose goods are seized has not the right to sue for damages, it would follow that the only sanction applicable to the person who disregards the provisions of the Act would be an indictment for the common law misdemeanour of disobeying a statute, which would be a very unsatisfactory state of affairs. No argument was addressed to us that, if the defendant was entitled to succeed on his counterclaim, the damages have been assessed on any wrong principle, and the result is that this appeal should be dismissed.

We want to add one further word. We do not desire that it should be thought that, in cases where a hire-purchase agreement contains such a clause as 3 (*b*) in the present case, the owners can avoid the necessity of going to the Court by putting pressure on the hirer to act ostensibly under that clause, when in fact all that they are doing is getting a consent to seize. Where a hirer has paid a substantial sum by way of instalments the number of cases in which, owing to temporary embarrassment caused by war conditions, he would really be willing to forego the benefit of all that he had paid must, we think, be very small. If such a

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case came before a court, we think it would be the duty of the court to ascertain whether the return of the chattel was really and truly the bona fide exercise of the option given by the clause, or whether, in truth, it was no more than a submission by the hirer to the owner exercising his right to seize.

Scott L.J. That is the judgment of Goddard L.J. and myself.

MacKinnon L.J. I have had the advantage of reading the judgment prepared by Goddard L.J. I entirely agree with it, and I only desire to say a few words in addition.

The appellants argue that they committed no breach of the Act which prohibited their taking possession of the car without the leave of the Court, for they say that the respondent consented to what they did by signing the document produced to him by Nye. Manifestly, the object of the Act is to protect those in the position of debtors from the exercise against them of the rights of their creditors. If the argument of the appellants is correct, that protection ceases for a humble and submissive debtor and only avails one who is astute and assertive of the benefit given him by this Act. The protection given by the Act against coercion will disappear in every case in which coercion is applied with sufficient vigour to make the man intended to be protected admit that he is not.

Prima facie the appellants took possession without the leave of the Court. That is contrary to the terms of the Act. I think it is no answer for them to say: "But we did "so with the consent of the respondent." That is what the judge held, and I think he was right. He did so on the authority of Farwell J. in *Soho Square Syndicate* v. *E. Pollard & Co., Ld.* (1). I express no doubt whatever as to the correctness of that decision, but the terms in which it was discussed were on a question whether a person entitled to the benefit of the Act could by contract agree to forego that benefit. I do not think that question arises in this case. I see

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(1) [1940] Ch. 638.

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no evidence that the respondent ever made any contract with the appellants by which he agreed to forego the benefit of the Act, nor can I see that there was any consideration for such a contract. All he did was to sign a consent, and following that the appellants took possession of the car without any leave from the Court. I think it is no excuse for that breach of the prohibition of the Act for the appellants to say: "The "respondent was so fainthearted or ignorant that he consented "to our doing what we did." In the result, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Field, Roscoe & Co., for W. Parkinson Curtis, Bournemouth.*

Solicitors for respondent: *Stone & Stone.*

W. L. L. B.

1941
April 3, 4, 8.

NELSON *v.* ADAMSON.

Revenue—Income tax—Assessment—Securities situated abroad vested in trustees—Trust to pay annuity thereout—Residue payable to resident in United Kingdom—Assessment as of income arising from securities abroad—Assessment of income as arising from possessions abroad—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV., r.* 1, *Case V., r.* 2.

The testator, an Australian, by his will made in England, left his property in Australia, consisting of stocks and shares, to trustees on trust to pay from the income thereof an annuity, and to pay the income of the residue to his granddaughter, the appellant, who was resident in the United Kingdom. The trustees made no appropriation from the fund in respect of the annuity. The appellant was assessed under Sch. D, Case IV., r. 1, as on income arising from securities in a place out of the United Kingdom, the tax being payable whether the income was received in the United Kingdom or not. The appellant contended that she should be assessed under Case V., r. 2, of Sch. D, in respect of income arising from possessions out of the United Kingdom, the tax on which is only payable on the actual amount received here :—

Held, that the appellant was rightly assessed.

Baker v. *Archer-Shee* [1927] A. C. 844 ; 11 Tax Cas. 749 applied.

CASE stated by Special Commissioners of Income Tax.

On July 8, 1912, John Ettershank, of Victoria, Australia, died, leaving property in Australia. By his will dated July 2, 1912, made in England, he disposed of his property as follows : "I bequeath to my niece Agnes McDonald Ettershank . . . . "an annuity of 150*l*. during her life or until she shall marry ". . . . I devise and bequeath all my real and personal "estate . . . . unto the trustees . . . . upon trust that my "trustees shall sell call in and convert into money the same "and shall out of the moneys arising thereby . . . . make "provision for the payment of any annuities so bequeathed "and the death duties [thereon] . . . . and shall invest the "residue of such moneys in the names of my trustees in any "of the modes of investment hereinafter authorised. . . . My "trustees shall stand possessed of the said residuary moneys "and of the investments for the time being representing the "same . . . . upon trust to pay the income of my settled "residue to my granddaugher Betty Jane Chew Hooper "[the appellant] during her life . . . . for her separate use "without power of anticipation . . . . My trustees may retain "out of the annual income of my estate in every year . . . . "and . . . . shall divide the same equally between them a "sum equivalent to 5 per cent. of the net amount of the "income distributable during that year under the provisions "of this my will . . . . I declare that my will shall be construed "and take effect according to the law of England . . . ." The executors proved the will in Australia. The appellant became twenty-one years of age on May 13, 1931. She was resident in the United Kingdom until March 10, 1936, when she went to live in India. The annuitant was still alive. No appropriation had been made out of the residuary estate to meet the annuity. The appellant was assessed for income tax in respect of income received by her under her grandfather's will under Sch. D, Case IV., r. 1, of the Income Tax Act, 1918 (1). She appealed against this assessment.

Cyril King K.C. and *J. H. Bowe* for the appellant. The appellant is not entitled to income arising from these securities so as to bring her within Case IV., r. 1. All she is entitled to is to call on the trustees to administer the estate so as to give her the income as directed by the will. In other words, her income is from the trust, not from the stocks and shares, and her interest is an equitable interest in the residuary income after the payment of the annuity and the trustees' expenses, and that is a " possession " within the meaning of Case V.,

(1) Income Tax Act, 1918, Sch. D, Case IV., r. 1: " The tax " in respect of income arising " from securities in any place out " of the United Kingdom shall be " computed on the full amount " thereof arising in the year of " assessment, whether the income " has been or will be received in the " United Kingdom or not, subject " in the case of income not received " in the United Kingdom " to certain deductions and allowances.

Sch. D, Case V., r. 2: " The " tax in respect of income arising " from possessions out of the " United Kingdom, other than " stocks, shares or rents, shall be " computed on the full amount " of the actual sums annually " received in the United Kingdom " from remittances payable in the " United Kingdom . . . ."

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r. 2 of Sch. D. *Baker* v. *Archer-Shee* (1), which is relied on by the Crown, is distinguishable, because in that case there was only one beneficiary and the Crown conceded that the deduction of expenses did not matter. There the House of Lords decided that the beneficiary was specifically entitled to the dividends on the securities, but it is to be noted that Lord Sumner and Lord Blanesburgh dissented from this view. In *Murray* v. *Inland Revenue* (2) the Court of Session held that the expenses of management of a trust were no part of the income of the beneficiary, and that case was cited with approval by Lord Blanesburgh in *Baker* v. *Archer-Shee* (3). It appears from *Archer-Shee* v. *Garland* (4) that American law is the same as the English law contended for by the appellant. In *Reid's Trustees* v. *Inland Revenue* (5) the Lord President said: "Unless under very exceptional "circumstances, the monies which arise or accrue in the form "of income to trustees, as administrators of the estate under "their charge, are not simply passed on to the trust "beneficiaries as their income." That is equally applicable to an English case. [*Macfarlane* v. *Inland Revenue* (6); *Inland Revenue* v. *Crawshay* (7); and *In re Dawson* (8) were also referred to.]

Sir Donald Somervell A.-G., J. H. Stamp and *R. P. Hills* for the Crown. The appellant contends that she has no right to the dividends, but only a right to have the estate administered. That was the point decided in *Baker* v. *Archer-Shee* (3), in the sense contended for by the respondent. The appellant's right is, not to the balance of the residuary income after lawful deductions, namely, the annuity and the expenses, but to the whole of the dividends from which those deductions are to be made: see per Lord Wrenbury in *Baker* v. *Archer-Shee* (9). Her income is derived from the securities,

(1) [1927] A. C. 844; 11 Tax Cas. 749.

(2) (1926) 11 Tax Cas. 133; [1926] Sc. L. T. 714.

(3) [1927] A. C. 874; 11 Tax Cas. 785.

(4) [1931] A. C. 212; 15 Tax Cas. 693.

(5) (1929) 14 Tax Cas. 512, 523; 1929 S. C. 439, 445.

(6) 1929 S. C. 453; 14 Tax Cas. 532.

(7) (1935) 19 Tax Cas. 715.

(8) [1906] 2 Ch. 211.

(9) [1927] A. C. 866; 11 Tax Cas. 779.

not from the trust, and the trust is only machinery. *Baker* v. *Archer-Shee* (1) governs this case. [*Williams* v. *Singer* (2) was also referred to.]

Cur. adv. vult.

1941. Apr. 8. LAWRENCE J. read the following judgment. The question on this appeal is whether the appellant is in receipt of income arising from securities (stocks and shares) assessable under Case IV., r. 1, or from a possession out of the United Kingdom, assessable under Case V., r. 2. The material facts are that the appellant, who is resident in the United Kingdom, is life tenant under an Australian will under which the estate was bequeathed on trust to pay an annuity to another relative and the residue to her for life. The trustees have made no appropriation for the annuity, and are entitled under the terms of the will to a percentage on the net income for their services. The special commissioners have decided that the case of *Baker* v. *Archer-Shee* (1), governs the present case, and that the income of the appellant falls within Case IV., r. 1.

The main argument for the appellant is that *Baker* v. *Archer-Shee* (1) related to a sole beneficiary and is inapplicable to a trust under which there is an annuitant who has a prior right derived from the will to her annuity, that the basis of that decision was that the beneficiary had an equitable title to the very dividends on the stocks and shares, that the deduction of the expenses of the trustees then in question was conceded by the Crown, and that the beneficiary's only title where there is an annuity is to the residue. It is also argued that *Baker* v. *Archer-Shee* (1) is distinguishable because in the present case the trustees were appointed and remunerated under the will, and not by the appellant. Reliance was also placed on *Murray* v. *Inland Revenue* (3), where it was held in the Court of Session that a life-renter could not be treated for the purposes of a claim to repayment of income tax in respect of personal allowance as having an income which included expenses of trustees appointed by the will; on *Macfarlane* v. *Inland Revenue* (1), where it was held that trustees' expenses of management could not be added to the net income for the purposes of a claim under s. 24 of the Finance Act, 1920; and on *Inland Revenue* v. *Crawshay* (2), where it was held that an annuitant and a beneficiary of part of the residue were to be treated as rateably entitled to the income from stocks free of income tax. These cases do not appear to me very close to the present, but *Inland Revenue* v. *Crawshay* (2) seems to me to be more in the Crown's favour than in the appellant's. The Attorney-General, on the other hand, contends that the annuity and remuneration here in question are charged on the residuary income of the appellant, and that her income arises none the less from securities, stocks and shares, and that the speech of Lord Wrenbury in *Baker* v. *Archer-Shee* (3) is just as applicable to the annuity and remuneration in question as to the expenses there dealt with.

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(1) [1927] A. C. 844; 11 Tax Cas. 749.
(2) [1921] 1 A. C. 65; 7 Tax Cas. 387, 419.
(3) [1926] Sc. L. T. 714; 11 Tax Cas. 133.

In *Baker* v. *Archer-Shee* (4) it was held that the interposition of a trustee does not prevent the income of the cestui que trust arising, within the meaning of the Income Tax Acts, from the stocks and shares held by the trustee, and the question is whether the further interposition of an annuitant makes any difference. Does the income which the cestui que trust receives arise any more from the trust than it does when there is no annuitant? It arises from the trust then in the sense that it belongs at law to the trustee and is payable by him, and that the machinery of the trust is an essential part of the testator's intention. Is it true to say that the income arises from a possession when there is an annuitant or two beneficiaries, but from stocks and shares when there is a sole beneficiary? Why is a trust fund a possession when there is an annuity charged on it, and not a possession when there is not?

I have come to the conclusion that the decision of the Special Commissioners is right, and that the residue still arises from the stocks and shares within the meaning of the Income Tax

(1) 1929 S. C. 453; 14 Tax Cas. 532.

(2) (1935) 19 Tax Cas. 715.

(3) [1927] A. C. 865-6; 11 Tax Cas. 779.

(4) [1927] A. C. 844; 11 Tax Cas. 749.

Acts, and no more arises from the trust than in the case where there is no annuity. I do not think that any such fine distinction as that suggested by the appellant exists in the contrast drawn in the Income Tax Act, 1918, between income arising from possessions and income arising from stocks and shares. The appeal is therefore dismissed with costs.

Solicitors for appellant: *Waterhouse & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

W. L. L. B.

1941
April 29 :
May 9.

WHIGHAM *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Trust by parent in favour of children—Defeasance "if any child cease to be a British subject" or charge his share—Limitation "for some period less than the life of the child"—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* 1 (*c*).

The appellant settled certain funds on trust that the trustees should stand possessed of the investments and annual income for all or any of his children who should attain the age of twenty-five or be living at the expiration of twenty-one years from the death of the settlor, whichever should first happen. There was a proviso (inter alia) that, if any child should, before becoming absolutely entitled in possession to a share of the trust fund, cease to be a British subject, or attempt to alien, charge, or anticipate the same, or if any event should happen whereby, if such share were payable to him absolutely, he would be deprived of the right to receive the same or any part thereof, he should forfeit his interest. The settlement gave to the trustees the statutory powers of applying income to maintenance and education and for accumulation during infancy :—

Held, that the proviso for forfeiture on the happening of the contingency named did not make the income payable to a child for any period "less than the life of the child" within s. 20, sub-s. 1 (*c*), of the Finance Act, 1922 ; and, therefore, that the income arising from the property comprised in the settlement was not to be deemed to be the income of the appellant for purposes of income tax and sur-tax.

Wiggins v. *Watson's Trustees* [1933] 1 K. B. 245 ; [1934] A. C. 264, followed.

Levitt v. *Inland Revenue Commissioners* (1932) 17 Tax Cas. 719, not followed.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the special commissioners held on July 29, 1940, the appellant, Walter Kennedy Whigham, appealed against assessments to sur-tax for the years ending April 5, 1938 and 1939, in the sums of 165,000*l.* and 31,356*l.* respectively. In computing the amount of the assessments, there was included under s. 20, sub-s. 1 (*c*) of the Finance Act, 1922, the income arising in those two years from property comprised in a settlement dated July 14, 1925, made by the appellant for the benefit of his children.

The settlement provided (inter alia) : "The trustees shall "stand possessed of the investments hereinbefore directed to "be made or authorised and of the annual income thereof, "upon trust for all or any the children or child of the settlor "who attain the age of 25 or are living at the expiration of "21 years from the death of the settlor whichever event shall "first happen and if more than one in equal shares absolutely. "Provided always that if any child of the settlor shall die "before attaining a vested interest in the trust fund leaving "a child or children him or her surviving who attain the age "of 21 such child or children shall take and if more than one "equally between them the share which their parent would "have taken if he or she had attained the age of 25. Provided "also that if any child of the settlor shall die before attaining "a vested interest leaving a wife or husband him or her "surviving such child shall have power to appoint to or for "the benefit of such wife or husband during the residue of "his or her life or any less period all or any part of the annual "income of the share to which such child would have been "entitled if he or she had attained the age of 25 and upon "any such appointment the trusts and powers herein directed "to take effect in the event of such child failing to attain a "vested interest shall take effect subject to the interest limited "by such appointment. The statutory powers of applying "income for maintenance education and benefit of infants and "the statutory directions for accumulation of surplus income "shall apply to the contingent or presumptive share of any "child of the settlor who has not attained an absolute vested "interest in a share of the trust fund in the same manner as "if such child was under the age of 21 years and contingently "entitled to such share on attaining that age. (6.) If any "child of the settlor should before becoming absolutely entitled "in possession to a share of the trust fund cease to be a British "subject or attempt to alien charge or anticipate the same "or any part thereof or do or attempt to do or suffer any "other act or thing or if any event should happen whereby if "such share were payable to him or her absolutely he or she "would be deprived of the right to receive the same or any "part thereof the trusts hereinbefore declared in his or her

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"favour shall forthwith absolutely cease and determine and "he or she shall be deemed for all the purposes of these "presents to have died under the age of 21 but without "prejudice to any payment of income or capital which the "trustee may previously have made to or for him or her in "respect of such share."

The appellant had three children: Francis, born April 30, 1918; Walter, born November 6, 1919; and Bernard, born February 6, 1924.

The Commissioners held that the provision in favour of a child was liable to be determined by the terms of clause 6 of the settlement and that the case was covered by *Levitt* v. *Inland Revenue Commissioners* (1) and fell within s. 20, sub-s. 1 (*c*), of the Finance Act, 1922 (2). They reduced the assessment for 1937–38 to 135,418*l*. as agreed between the parties, and approved the assessment for 1938–39. This case was then stated at the request of the appellant for the opinion of the High Court.

Scrimgeour for the appellants. This settlement is not touched by the Finance Act, 1922, s. 20, sub-s. 1 (*c*). The settlor has provided that, if a child ceases to be a British subject, he shall cease to benefit. The proviso in this settlement merely provides for a termination of the child's interest. No interest remains in or reverts to the settlor, and against such a provision the sub-section is not directed. [He referred to *Gillies* v. *Inland Revenue Commissioners* (1).] The period of the enjoyment is to be looked at in all cases. In *Inland Revenue Commissioners* v. *Trustees of St. Luke's Hostel* (2) Lord Hanworth M.R. stated the effect of s. 20, sub-s. 1, as being that "a sum which is paid out of and was part of the "income of a person who is or was able to obtain the beneficial "enjoyment thereof is to remain for purpose of tax his income." The test is whether the income reverts to the settlor. *Levitt* v. *Income Revenue Commissioners* (3), which the Commissioners followed, is distinguishable, because in that case there was a power of appointment reserved to the disponer under the deed of settlement in the event of the child marrying someone who was not of the Jewish faith or race. Further, the decision is inconsistent with that in *Wiggins* v. *Watson's Trustees* (4) where the House of Lords held that a settlement on a child for life with a power of revocation was not a settlement for a period less than life. The child himself here may bring about the forfeiture and the limitation is not thereby made for a period "less than life." The trust is not "until" forfeiture, but for life, subject to divesting on a contingency. In *Nettlefold* v. *Inland Revenue Commissioners* (5) surplus income of a trust fund was reserved by the settlor for his children for a period of eight years after payments had been made to charities and other persons as the disponer should direct. The point here raised was not taken by the Crown in that case, but payments made under the deed were held not to constitute income of the settlor for purposes of sur-tax. Here the settlor has alienated the income irrevocably for a period not less than life.

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(1) (1932) 17 Tax Cas. 719.

(2) Finance Act, 1922, s. 20, sub-s. 1, provides: "Any income ". . . . (*c*) which by virtue or in "consequence of any disposition "made, directly or indirectly, by "any person . . . . is payable "to or applicable for the benefit "of a child of that person for some "period less than the life of the "child; shall . . . . so long as "the child is an infant and "unmarried, be deemed for the "purposes of the enactments "relating to income tax (including "super-tax) to be the income ". . . . of the person, if living, "by whom the disposition was "made, ... and not to be for "those purposes the income of any "other person: . . . . Provided "also that—(i.) the above paragraph (*c*) shall not apply as regards any income . . . . which is "payable to or applicable for the "benefit of a child during the "whole period of the life of the "person by whom the disposition "was made: and (ii.) for the "purposes of the said paragraph "(*c*) income shall not be deemed "to be payable to or applicable "for the benefit of a child for some "period less than its life by reason "only that the disposition contains a provision for the payment "to some other person of the "income in the event of the "bankruptcy of the child, or of "an assignment thereof, or a "charge thereon being executed "by the child."

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. This case is covered by *Levitt* v. *Inland Revenue Commissioners* (3)

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(1) (1928) 14 Tax Cas. 329.
(2) (1930) 15 Tax Cas. 682, 689.
(3) 17 Tax Cas. 719.
(4) [1933] 1 K. B. 245; (H. L.) [1934] A. C. 264.
(5) (1933) 18 Tax Cas. 235.

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The Finance Act, 1922, s. 20, sub-s. 1 (*c*), is directed against settlements with limitations, whereby (*a*) the income goes back to the settlor, (*b*) the settlor has not parted with the income for more than a certain period, (*c*) the income is secured to the child of the settlor for a period less than life. In all these cases the income is deemed to be that of the settlor, but it is not essential for the operation of sub-s. 1 (*c*) that the income should in all cases revert to the settlor, and it was not so regarded in *Levitt's* case (1). *Wiggins* v. *Watson's Trustees* (2) does not overrule *Levitt's* case (1) and, indeed, it is directed to a different point. It only deals with the effect of an overriding power of revocation reposed in the settlor as rendering the period less than life. In *Wiggins* v. *Watson's Trustees* (2) this power was held not to have that effect because the power of revocation was not contained in the limitation itself, but was a power to revoke the whole deed. In *Levitt's* case (1) the limitation until the youngest of a class of children should reach the age of twenty-one was fatal and resulted in the period being "for less than the life" of the child. Proviso (ii.) to s. 20, sub-s. 1, which protects cases of defeasance in bankruptcy or charge, shows that other cases of defeasible interests are not protected, but render the sub-section applicable in the present case. The substance of the matter must be looked at in each case, and the trust as to the forfeiture of the child's interests in the event of his ceasing to be a British subject makes sub-s. 1 (*c*) operative, the period of enjoyment being thus for less than the child's life.

Scrimgeour in reply. *Levitt's* case (1) is distinguishable. Alternatively, it was wrongly decided. The present case is even stronger than *Wiggins* v. *Watson's Trustees* (2) and is governed by it. The proviso to s. 20, sub-s. 1 (*c*), was probably inserted ex abundanti cautela: per Rowlatt J. in *Watson's Trustees* v. *Wiggins* (3).

Cur. adv. vult.

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(1) 17 Tax Cas. 719.

(2) [1934] A. C. 264.

(3) [1933] 1 K. B. 245.

1941. May 9. LAWRENCE J. read the following judgment. In this case the appellant settled sums of money upon trust for his children who were then minors. [His Lordship read clause 6 of the settlement and proceeded:] This seems a patriotic provision, but, none the less, according to the Crown, it attracts tax to the whole income of the settled fund. It is said that the settlement infringes s. 20, sub-s. 1 (*c*), of the Finance Act, 1922, in that, by virtue of the disposition, income is payable to the children for some period less than their lives, and is not protected by the second proviso, and that in any event the decision of the Court of Session in *Levitt* v. *Inland Revenue Commissioners* (1) is in point and must be followed. It is conceded by the Crown that *Levitt's* case (1) is distinguishable on the facts since the settlor there reserved to himself a power of appointment if the child on whom the property was settled should marry someone not of the Jewish race or faith, whereas in the present case the property will not in any case revert to the settlor, but it is said that that distinction was not referred to by the learned judges of the Court of Session and is in law irrelevant.

The appellant, in the first place, contends that all the sub-sections of s. 20 impliedly contemplate that the income deemed to be the income of the settlor should be capable of ultimate enjoyment by the settlor or his wife. The appellant also relies on *Wiggins* v. *Watson's Trustees* (2), where it was held that a settlement on a child for life, containing a power of revocation with the consent of one of five persons, was not a settlement for a period less than the life of the child, but the distinction was insisted on between a settlement *until* a certain event and a settlement which may be defeated in a certain event. The Attorney-General's explanation of this case was that the settlement was not held to be for a period less than the life of the child, because the power of revocation was a power to revoke the whole deed, and though contained in the deed was not contained in the limitation itself.

(1) 17 Tax Cas. 719.
(2) [1933] 1 K. B. 245; [1934] A. C. 264.

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In my opinion this explanation does not cover the whole decision. Rowlatt J. said in his judgment (1): "I think, "however, that there is another ground on which that argument "can be displaced. I do not think the exemptions deal with "circumstances quite on the same plane as the circumstances "with which we have to deal. The exemptions are dealing "with events working a defeasance within the limits of the "limitation itself. The limitation stands unless bankruptcy "or assignment or the death of the father or something "equivalent intervenes which may shorten the limitation as "it stands." Romer L.J. also said (1): " It was said by "Mr. Stamp that we ought to read this settlement as though "the direction were to pay the income to the child during "his life, or until the power of revocation is exercised. If the "trust had been expressed in those terms I think I should "agree that the child was not entitled by virtue or in consequence of the instrument to the income during his life." These observations appear to me to be in the appellant's favour. What the learned judges were saying was that, apart from the settlor's right to revoke, the fact that the disposition of the settlement itself was not until the bankruptcy of the settlor, but in the event of the bankruptcy of the settlor, prevented the application of the section. So, in the present case, in my opinion, the disposition of the settlement was for the lives of all the children and not *until* they ceased to be British subjects, and clause 6 merely provides for defeasance if any child should cease to be a British subject before becoming absolutely entitled.

It is to be observed that when the Court of Session decided *Levitt's* case (2), *Wiggins* v. *Watson's Trustees* (3) had only been heard before Rowlatt J., and the only learned Lord of the Court of Session who noticed it thought that the argument had not been fully presented to Rowlatt J., a suggestion which any judge who has had the advantage of listening to Mr. Stamp must find it difficult to accept.

For these reasons I hold that I ought to follow *Wiggins* v.

(1) [1933] 1 K. B. 245, 250, 258.
(2) 17 Tax Cas. 719.
(3) [1934] A. C. 264.

Watson's Trustees (1) rather than *Levitt's* case (2). The appeal will be allowed.

Appeal allowed.

Solicitors: *Linklaters & Paines; The Solicitor of Inland Revenue.*

(1) [1934] A. C. 264.

(2) 17 Tax Cas. 719.

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Mar. 24.

HORN *v.* SUNDERLAND CORPORATION.

Acquisition of land—Compensation—Land used for agricultural purposes—Ripe for building—Compensation awarded on value as building land—Compensation also for disturbance to business—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *rr.* 2, 6.

The Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2 provides: "In assessing compensation an official "arbitrator shall act in accordance with the following rules: . . . . "(2.) The value of the land shall, subject as hereinafter provided, "be taken to be the amount which the land if sold in the open "market by a willing seller might be expected to realize . . . . "(6.) The provisions of r. (2.) shall not affect the assessment of "compensation for disturbance or any other matter not directly "based on the value of the land":—

Held, by the Court of Appeal (Sir Wilfrid Greene M.R., and Scott L.J., Goddard L.J. dissenting), that when land being used for agricultural purposes is ripe for building and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance shall only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land.

Per Sir Wilfrid Greene M.R. It is a mistake to construe rr. 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

Per Scott L.J. Prima facie the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, the estimation of which must take into account future and potential value, including "special adaptability." The market value is to be taken as at the moment when the notice to treat was given and to be of land in a normal state for the market. If the state of the land is better than normal, it should attract a higher price; if it is below the normal, it should attract a lower price. Included in the price of the land on a forced sale will be, not only the market value, but also the amount of the personal loss imposed on the owner by the sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, but the statutory compensation must never exceed the owner's total loss.

Decision of Atkinson J. reversed.

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APPEAL from Atkinson J.

The following statement of facts is taken from the judgment of Sir Wilfrid Greene M.R.

On August 20, 1936, the appellants, the corporation of Sunderland, served on the respondent a notice to treat in respect of 102·123 acres of freehold land known as Springwell Farm and owned by the respondent. On May 13, 1937, the appellants served on the respondent another notice to treat in respect of the sand and gravel and the upper stratum of limestone lying within and under the same land. These notices were served in connection with a compulsory purchase by the appellants under s. 64 of the Housing Act, 1925, and they were preceded by the usual order made by the corporation and confirmed by the Minister of Health in accordance with the provisions of Schedule III. to that Act. Para. 3 of that schedule provides that the order of the Minister "shall "incorporate, subject to the necessary adaptations, the Lands "Clauses Acts (except s. 127 of the Lands Clauses Consolidation "Act, 1845) as modified by the Acquisition of Land (Assessment of Compensation) Act, 1919." The respondent was a farmer and he occupied the land in question as farm land, largely for pedigree horses. The sand, gravel and limestone he acquired in March, 1936. By his particulars of claim, submitted under the earlier notice to treat, he put forward the following claims: (1.) Land, 47,713*l.* (2.) Amount required to induce the occupier of another farm to give immediate vacant possession (exclusive of the cost of land), 12,900*l.* (3.) Unforeseen damage arising by reason of another farm having to be rented (to be claimed later in this event). (4.) Loss on farming operations from date of notice to treat to date of dispossession, 300*l.* Alternatively to claims (2.) and (3.), he claimed: (1.) Injurious affection with reference to trust money in Ayres Quay business, 10,760*l.* (2.) Loss on forced sale of pedigree horses and other stock at Springwell Farm, 7000*l.* (3.) Loss of farm profits (three years at 350*l.* a year), 1050*l.* The claim under head (4.) and the alternative claim (3.) were abandoned in the course of the ensuing arbitration. Alternative claim (1.) proved to be devoid of foundation, The claim for 47,713*l.* for the land was put forward by the respondent on the basis that the land was a building estate ripe for immediate development and should be valued as such and not as a farm. By his particulars of claim submitted under the later notice to treat the respondent claimed 1988*l.* for the sand and gravel and 1491*l.* for the limestone. The assessment of compensation was referred to Sir Charles Gott, one of the official arbitrators under the Acquisition of Land (Assessment of Compensation) Act, 1919. By his award dated April 8, 1940, the arbitrator assessed the compensation payable to the respondent in respect of the subject-matter comprised in both notices to treat at the sum of 22,700*l.* No separate assessment was made in respect of the sand, gravel and limestone, the evidence on both sides being to the effect that, if they had to be considered as likely to be worked, it would be impossible to get building value for the surface of the farm. The award contained the following paragraph: "The said sum of 22,700*l.* does not include any sum as "compensation for the disturbance of the claimant's business "by reason of his dispossession of the land. I find that the "sum so assessed could not be realized by a willing seller in "the open market unless vacant possession were given to the "purchaser for the purpose of building development." On May 16, 1940, the respondent served a notice of motion asking that the award might be remitted for the reconsideration of the arbitrator on the ground that there were errors of fact and law apparent on the face of the award in three respects. Two of these related to a cross appeal which does not call for report. The other alleged error was stated to be as follows: "The reason given by the arbitrator for not "awarding any sum by way of compensation for consequential "damage is erroneous in law." The motion was heard by Atkinson J., on December 18 and 19, 1940, and he held that under r. 6 of s. 2 of the Act of 1919, the respondent retained his right to be compensated for the disturbance of his business, notwithstanding that he was receiving the selling value of his land, and ordered the award to be remitted to the arbitrator to assess the loss occasioned by the disturbance of the respondent's business. The corporation appealed.

Beyfus K.C. and *J. Charlesworth* for appellants. The arbitrator has found that the claimant could not have sold the land in the open market at a price equal to the sum awarded unless vacant possession were given to the purchaser for building development. He has, therefore, rightly disallowed compensation for disturbance, for if, in addition to the value of the land, the respondent were awarded compensation for disturbance, he would be placed in a better position than if he had sold the land voluntarily, and that would be a negation of the principle of compensation. The law is summed up as much as possible in favour of the respondent in Cripps on Compensation, 8th ed., p. 183. It is true that s. 2, r. 2, of the Acquisition of Land (Assessment of Compensation) Act, 1919, lays down the method of computing the value of the land itself while r. 6 provides also for compensation for disturbance, but it is not the policy of the Act that a claimant should make a profit; and it is not in every case that he is entitled to compensation for disturbance. [They referred to *Metropolitan Railway Co.* v. *Burrow* (1).] *Venables* v. *Department of Agriculture for Scotland* (2), confirms the view that under the Act of 1919 anyone dispossessed of property is entitled to compensation not only for its loss but also in a proper case to compensation for other loss resulting from the enforced sale, but the compensation payable in respect of these two elements form a single amount of compensation with the exception of the element of the injurious affecting of other land: see s. 48 of the Lands Clauses Act, 1845. Thus *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (3) shows that stamp duty is payable on the whole compensation as consideration for the sale, although part of it is attributable to compensation for disturbance. The arbitrator here awarded a sum representing the value of the property as a building site as opposed to its mere agricultural value. That involved the pulling down of any existing buildings on the land, and, therefore, the disturbance of the respondent's business; but Atkinson J. was in error in saying that the respondent had two assets, the land worth 22,700*l.* and the business. The value of 22,700*l.* depended on the land being used for building and, therefore, negatived the carrying on of a farm there. At most the respondent could only be entitled to compensation for disturbance if the agricultural value of the land and the compensation for disturbance were together more than 22,700*l.* and then he could be given that surplus. It is obvious that there is no question of a surplus here. That view receives support from *Mizen Bros.* v. *Mitcham Urban District Council* (1), which is referred to in Cripps on Compensation, 8th ed., p. 271. The claimant who wants compensation for disturbance has to prove loss owing to that disturbance. The disturbance consists in the alteration of something that would otherwise have continued so that if the arbitrator values the land on a basis involving the discontinuance of its earlier use, and this results in the award of a sum larger than the combined value of the land for the purpose for which it was being used and the compensation for disturbance, there is no room for an award of compensation for disturbance as well as the larger sum.

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(1) (1884) The Times newspaper of Nov. 22.

(2) 1932 S. C. 573.

(3) (1887) 12 App. Cas. 315.

Squibb for the respondent. The fallacy underlying the argument for the appellants is that it seeks to compare the value of the land for agricultural purposes with its value for building purposes. A piece of land has only one value, namely, its value on a sale in the open market. If land is ripe for building, no prudent owner would sell it for any other purpose. The price of the land sold as building land is the market price and that is what the arbitrator has to ascertain under r. 2, and r. 6 clearly provides that "the provisions of "r. 2 shall not affect the assessment of compensation for "disturbance." The respondent, therefore, is entitled to compensation for disturbance as well as to the market value of the land. It is said that no compensation is payable for disturbance because the building value would be unobtainable without giving up the farm. But that would be equally true if the land had been sold for agricultural purposes. If the respondent buys another farm for 5000*l.* and spends another 5000*l.* on setting up his business again, he will be left with 12,700*l.* and his business, whereas, if he had not been disturbed in his occupation, he would have had his business and property worth 22,700*l.* The arbitrator has to ascertain (*a*) the market value of the land and (*b*) the compensation for disturbance of the business and he has no right to disregard item (*b*). [SIR WILFRID GREENE M.R. These matters are not in water-tight compartments, but are matters aiding him to arrive at a single amount.] Yes, but the law by rr. 2 and 6 of s. 2 provides for this being done in two stages and that the arbitrator has failed to do. The whole intention is that the person dispossessed shall be put in a position not pecuniarily worse than when in occupation of the land, and it is to be remembered that this business may have a special value because it is conducted so close to the town.

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(1) Unrep. July 19, 1929.

Beyfus K.C. replied.

Cur. adv. vult.

1941. Mar. 24. The following judgments were read.

SIR WILFRID GREENE M.R. [after stating the facts as set out above :] The main appeal raises a question of some nicety and considerable importance. It is not disputed that the sum of 22,700*l.* awarded to the respondent, which is at the rate of 220*l.* an acre, was arrived at on the footing that the land was building land and is far in excess of the value of the land considered as agricultural land. The respondent claimed that the land should be valued on the footing that it was building land and this was accepted by the appellants.

The basic argument on behalf of the appellants may best be summarized by quoting an extract from the points submitted by the acquiring authority in *Mizen Bros.* v. *Mitcham Urban District Council* (1), decided by a Divisional Court of the King's Bench Division, to which reference will be made later

(1) Unrep. July 19, 1929.

Sir Wilfrid Greene M.R.

in this judgment. In that case a similar point to that now in issue arose with regard to a market garden business, and the language of the extract is as follows: "That the "claimants were not entitled to combine in the same claim a "valuation of the claimants' land on the footing of an "immediate sale for building purposes with vacant possession "and a claim for disturbance and consequential damage on "the footing of interference with a continuing market garden "business." This argument was accepted by the Divisional Court, but it is argued on behalf of the respondent that the decision was in that respect wrong in law. The Acquisition of Land (Assessment of Compensation) Act, 1919, introduces certain new rules to be followed in assessing compensation where land is being acquired by a government department or a local or public authority. Subject to these rules and to certain other provisions of a procedural nature, the Lands Clauses Acts remain applicable in the present case: s. 7, sub-s. 1, of the Act of 1919 and Housing Act, 1925, Sch. III., para. 3. Apart from injurious affection, the question which a jury under the Lands Clauses Acts and an arbitrator under the Act of 1919 has to answer is: What is the price which ought to be paid to the owner for the land which is being compulsorily acquired, price and compensation being the same thing under different names: see *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (1). It became the practice under the Lands Clauses Acts to ask the jury to deal separately with the elements into which the price was capable of being split, although there was in strictness no necessity to do this, since the price to be paid was a global sum. The principles on which the price or compensation payable for the land acquired fell to be ascertained were settled by a long series of decisions and were extremely favourable to the landowner. The broad principle was that the price should be fixed on the basis of the value to the owner and this involved taking into consideration a number of matters which I need not mention as they are well known. But one element which the jury was entitled to take into

(1) 12 App. Cas. 315.

consideration was the damage suffered by the owner from disturbance, for example, of his business. It is important in considering the present case to remember that this was not a separate head of compensation such as compensation for injurious affection, but merely one of the elements going to build up the purchase price to which the owner was fairly entitled in all the circumstances of the case. Mr. Squibb, in his able argument, maintained that under the Act of 1919 the value of the land and compensation for disturbance must be considered as two distinct matters (so to speak, in watertight compartments), in respect of each of which the landowner was entitled as a matter of law to have a sum awarded for compensation, and that the question whether compensation for disturbance should be awarded could not in any way be affected by the nature and amount of the sum arrived at in respect of the value of the land. This argument would, in my opinion, have been incorrect if the case had been one under the Lands Clauses Acts alone, for it does not appear to me consistent with the decision in *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (1), but it must be seen whether the position is different in a case under the Act of 1919, to a consideration of which I now turn.

The Act of 1919 provides in s. 1, sub-s. 1, for the reference of " any question of disputed compensation " in cases to which the Act applies and s. 2 lays down certain rules in accordance with which the arbitrator is to act " in assessing "compensation." These rules in a number of respects alter the principles governing the assessment of compensation which had been established by judicial interpretation under the Lands Clauses Acts. The principle rule to be considered in the present case is r. 2, which is as follows: " The value "of the land shall, subject as hereinafter provided, be taken "to be the amount which the land if sold in the open market "by a willing seller might be expected to realize: Provided "always that the arbitrator shall be entitled to consider all "returns and assessments of capital value for taxation made "or acquiesced in by the claimant." It will be seen at once that this principle of valuation differs from that adopted under the Lands Clauses Acts since the test adopted is that of a willing seller in the open market. Had the matter stood there, it would appear that the price or compensation to be paid for the land would have had to be ascertained without giving any consideration to the loss suffered by the owner through disturbance. But r. 6 provides as follows: "The provisions "of r. (2.) shall not affect the assessment of compensation for "disturbance or any other matter not directly based on the "value of land."

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(1) 12 App. Cas. 315.

Now, r. 6 does not confer a right to claim compensation for disturbance. It merely leaves unaffected the right which the owner would before the Act of 1919 have had in a proper case to claim that the compensation to be paid for the land should be increased on the ground that he had been disturbed. It is true that the arbitrator now cannot well avoid doing what a jury under the Lands Clauses Acts was not bound to do, namely, arrive at one figure for the value of the land and (in a proper case) another figure for disturbance, but these two figures are still, in my opinion, merely the elements which go to build up the global figure of price or compensation payable. The sum of them would be the proper figure to be inserted in a conveyance and stamp duty would be paid on it at the rate appropriate to the purchase money payable on a conveyance on sale, as was the case under the Lands Clauses Acts: *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (1). In view of these considerations, I cannot accept Mr. Squibb's argument. I have set them out at length since they have an important bearing on the question which we have to decide. The truth of the matter is that, as in cases under the Lands Clauses Acts alone, so in cases where the Act of 1919 applies, the sum to be ascertained is in essence one sum, namely, the proper price or compensation payable in all the circumstances of the case. If those circumstances are such as to make it impossible for the owner to claim that he has suffered damage through disturbance for which he ought to be compensated, then he is not entitled to have the price or compensation for his land increased by an addition for disturbance even if he has in fact been disturbed. It is a mistake to construe rr. 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

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(1) 12 App. Cas. 315.

In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is for the purpose of valuation to be treated as building land and for the purpose of disturbance as agricultural land, and he says that the sum properly payable to him for the loss of his land is (*a*) its value as building land plus (*b*) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can only realize the building value in the market if he is willing to abandon his farming business to obtain the higher price. If he claims compensation for disturbance of his farming business, he is saying that he is not willing to abandon his farming business, that is, that he ought to be treated as a man who, but for the compulsory purchase, would have continued to farm the land, and, therefore, could not have realized the building value.

Approaching the matter from rather a different angle, I may put the question thus : Is the sum fixed as the value of the land without any addition for disturbance sufficient to compensate him for the loss which he suffers by having his land taken from him ? In my opinion, this question must be answered in favour of the appellants, subject to the qualification mentioned above. Some examples will illustrate my meaning and support my conclusion. Let me take the case of a farmer who is voluntarily selling his land. First of all, I will assume that the land is merely agricultural land fetching as such a price in the market which I will take as 10,000*l*. If he sells this land and is minded to continue farming elsewhere, it will in one way or another cost him (say) 2000*l*. to move to another farm, and if that farm costs 10,000*l*. he will be 2000*l*. the worse off. If the case were one of compulsory purchase, it would be obvious that, unless he were to receive 2000*l*. for disturbance, he would to that extent have been damnified. Now let me assume that the land is building land and that he sells it for 20,000*l*. If he is minded to continue farming and purchases another farm for 10,000*l*. and spends and loses 2000*l*. in moving, he is 8000*l*. better off than he would have been if he had continued to farm on the land. If the purchase were a compulsory one and he were awarded 2000*l*. for disturbance in addition to the 20,000*l*. he would be 10,000*l*. better off. In such a case the 2000*l*. is not an element of loss at all, but merely a diminution of the profit which he obtains by giving up an uneconomic use of the land and realizing its true economic value. It is true that, while he is using the land for farm purposes, and notwithstanding that user, the land has its building value which he can realize at any moment that he chooses to do so, but this is beside the point. The extra price which he could realize could only be realized by ceasing to farm the land and would more than compensate him for what it would cost him as a farmer to move to another farm if he were minded to do so.

Mr. Squibb pointed out that there are not two values under r. 2, building and agricultural, but one value only, and it is to this value that the owner is entitled. This is no doubt true. It is not, however, for the purpose of r. 2 that agricultural value comes into the picture, but (as will be seen later) for the purpose of r. 6, since the object of ascertaining it is to enable the arbitrator to see whether the owner can be said to suffer damage for disturbance of his farming business in view of the amount assessed for the value of the land under r. 2.

It was also said by Mr. Squibb that, if the respondent is wrong in his contention, results will follow which the legislature cannot have intended. As an illustration of his point, I may take the case of land which, at the time of acquisition, has a potential value as building land which gives it a value (say 11,000*l.*) rather higher than would have been the case if it had been purely agricultural (say 10,000*l.*). If by disturbance the owner suffers a loss of 2000*l.* and nothing is to be awarded in respect of that disturbance, the owner will be damnified. The reasoning which appeals to me does not, however, lead to any such result. In such a case the loss of disturbance would, in my judgment, be 1000*l.*, and the owner, if he moved to another farm costing 10,000*l.* and spent or lost 2000*l.* in the process, would be completely indemnified by receiving 11,000*l.* for the value of the land and 1000*l.* for disturbance. If he received an additional 1000*l.* for disturbance he would be receiving profit, not compensation.

Another illustration may be taken from the case of two adjoining owners of similar plots of land ripe for building of whom one has left his land uncultivated and the other has brought it to a high state of cultivation. It is said that to give the same figure of compensation to each of them would be unjust, since the industrious owner would lose the benefit of his cultivation as well as his land and it would cost him money to obtain land in as good a state of cultivation. But this is, in my opinion, a fallacy. It would not be that the industrious owner would suffer a loss which the other did not. If he was minded to acquire another farm and to spend part of his purchase money in moving into it, the money so spent would represent not loss, but expenditure of part of the profit realized by the cessation of his farming activities on the land taken and the reception of its value as building land.

In *Mizen Bros.* v. *Mitcham Urban District Council* (1) the same point as that which arises here was decided in favour of the acquiring authority by a Divisional Court consisting of Lord Hewart C.J., Avory and Branson JJ. We have been furnished with a transcript of the argument and the judgment. There was no reasoned judgment, but the

(1) Unrep. July 19, 1929.

considerations which influenced the members of the Court sufficiently appear from their interlocutory observations. In that case the land was used as a market garden and was in a high state of cultivation. It had erected on it greenhouses and other trade fixtures. The value of the land (including greenhouses and fixtures) as market garden land, did not exceed 12,000*l.*, but the land was ripe for immediate development for building and on that basis was valued by the arbitrator at 17,280*l.*, a sum which could only be realized if vacant possession were given, the seller being at liberty to remove the greenhouses, etc., and plants and crops. The arbitrator assessed the value of tenant right, fixtures, and disturbances (assuming that the owners were entitled to claim it) at 4640*l.*, a sum which, when added to the valuation of 12,000*l.* on a market garden basis, fell short of the value assessed on a building basis. The question submitted by the arbitrator for the opinion of the Court was "whether the claimants are "entitled to receive compensation in respect of the greenhouses "and other trade fixtures, forced sale or removal of crops "and plants, and compensation for disturbance and loss of "business, in addition to the amount which the land, if sold "in the open market by a willing seller to a willing buyer "with vacant possession, might be expected to realize." This question the Court answered in the negative, and, in my opinion, rightly so. It is worth pointing out that the statement of the reasons for this decision given in Cripps on Compensation, 8th ed., p. 27, is not accurate, and it appears to have misled Atkinson J., who did not enjoy the advantage of having this transcript before him. The basis of Atkinson J.'s judgment is to be found in the proposition that the respondent had "two assets—first, land worth 22,700*l.*, and, "secondly, a business worth so much." This, of course, is true in one sense, but the two values could not be realized at the same time. He could not farm and build as well. The only way in which he could realize the building value was by giving up farming on the land. The only way in which he could enjoy the farming value was by refraining from realizing its building value. By farming on building land he was, economically speaking, indulging an idiosyncrasy without any economic justification. By claiming for disturbance he is asking to be compensated, not for any real pecuniary damage, but for the loss of the opportunity to indulge his idiosyncrasy. If he were to spend the 22,700*l.* in buying other building land to farm it and received (say) 4000*l.* in respect of disturbance, he would in one sense be in precisely the same position after the transaction as he was in before, that is, he would be installed as a farmer on land the value of which in the market far exceeded its value as based on its actual user. In other words, he would have received a payment sufficient to enable him to indulge what I have ventured to call his idiosyncrasy, while all that he is entitled to is compensation for pecuniary loss, a different matter altogether.

From what I have said, it will appear (and this is the qualification which I have mentioned) that, in my opinion, the respondent is disentitled to an award for disturbance only if the sum of 22,700*l.* equals or exceeds the value of the land based on the hypothesis that it will be used only for farming purposes, plus whatever value should be attributed to the minerals, plus the loss by disturbance. To the extent (if at all) that the sum of these figures exceeds the sum of 22,700*l.*, compensation should be awarded. The arbitrator did not deal with this question which in view of the very high valuation of the land may perhaps be academic, but I express no opinion on that, since the respondent is anxious to have this aspect of the matter considered by the arbitrator at his own risk as to costs. I would refer the matter back to the arbitrator with a direction (1.) to ascertain (*a*) the value of the land considered as purely agricultural land with minerals in it, and (*b*) damages for disturbance; (2) if the sum of these two items exceeds 22,700*l.*, to award to the respondent an additional sum equal to such excess; (3) to deal with the costs of the further proceedings before him. It is necessary to include the minerals in this inquiry because on the basis of agricultural user of the land, they or part of them may have an independent value which cannot be the case if the land is regarded as building land. [His Lordship then dealt with the cross-appeal.]

SCOTT L.J. The facts have been sufficiently stated by my Lord. I agree with his conclusions of law and with his statement of and comments on *Mizen Bros.* v. *Mitcham Urban District Council* (1), a transcript of which was supplied us, and in essence my reasoning is the same as his, but, as I have followed a slightly different route, I will state my own reasons.

The question raised by the appeal is not free from difficulty, for it is not easy to formulate the general principle on which the answer must depend. The main object of the Act of 1919 was undoubtedly to mitigate the evil of excessive compensation which had grown up out of the theory, evolved by the Courts, that because the sale was compulsory the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to a willing buyer. The word "compensation" almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that, unless he received a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice. The 1919 Act, by its abolition of the ten per cent. addition for compulsory purchase (s. 2, r. 1), and by its special rules in rr. 3, 4 and 5, undoubtedly contributed to the intended reform, but perhaps the provision which was most likely to check exaggerated prices for the land sold was the reversal by r. 2 of the old sympathetic hypothesis of the unwilling seller and the willing buyer which underlay judicial interpretation of the Act of 1845.

It was argued before us for the respondent seller that, whatever the law had been before, the effect of r. 6 was to create a general right to compensation for "disturbance," and such other matters as are covered by the general words of that rule, over and above the price of the land taken, and that it was the statutory duty of the assessing tribunal, whatever the basis of valuation on which the price had been calculated, to add this figure to the valuation of the land to ascertain the

(1) Unrep. July 19, 1929.

total compensation. I do not accept that contention, for I agree with the opinion of Lord Alness (then Lord Justice Clerk) in *Venables* v. *Department of Agriculture for Scotland* (1) that r. 6 "confers no new rights although it manifestly purports "to save existing rights." The rule deals with other matters besides "disturbance," but that topic will serve as typical. The rule appears to me to have been inserted for two purposes, one general and the other particular—general, to prevent misconception as to the scope of the alteration effected by r. 2 in the previous judicial basis for ascertaining the market value to the owner of the land sold, and particular to forestal the argument that a willing seller *must* in law be presumed to have moved out voluntarily to give vacant possession to the buyer.

If these be the operative effects of the rule, the legal right to compensation for disturbance stands to-day where it did before the Act of 1919. In those cases where it was formerly payable, it is still payable ; in those where it was not payable, it is not payable to-day. It is, however, perhaps well to add a cautionary note to that rather sweeping statement. Rule 6 does not purport to give statutory validity to every pre-1919 judicial determination on the subject of "disturbance," still less to perpetuate exaggeration in the practice of juries or arbitrators. The sums given even in some of the reported cases seem to predicate an almost punitive measure of damages for eviction by compulsion of law. In my view, there never was anything in the Act of 1845 to warrant such indulgence to the dispossessed owner, and I know of no decision perpetuating any such generosity to the owner at the expense of the promoters which would be binding on us. Nor is there anything in s. 2, r. 6, of the Act of 1919 to compel us to follow a practice in either jury or arbitral assessments, if there was one, of giving to the dispossessed owner an amount of compensation which exceeds the total sum of his real loss arising from the acquisition. Such a practice would now, as before, contravene the basic principle of compensation.

On the facts of the present case, the claim for disturbance

(1) 1932 S. C. 573, 579.

would not, in my opinion, ever have been in law exigible, and its exclusion from the award would always have been, and, therefore, still is, proper. The Act of 1919 being disregarded, the question falls to be considered solely under the Act of 1845. If so, I ask myself: How can the respondent be entitled to a money payment by way of compensation for disturbance of his farm on the top of a price ascertained by valuing the whole of the land as land immediately ripe for building development and thus producing a figure much greater than the market value of it as a farm? Ex hypothesi, the building value is only realizable if and when the land is offered in the market as building land, which necessarily postulates that the selling owner will have given up his farm and cleared the land of all its farm buildings, stock and implements, or, at least, is ready and willing to do so at his own expense. Conversely, in so far as he chooses to leave that task to be performed by the purchaser, he must submit to the deduction of the cost of it from his price. This broad view is, I think, fully borne out by the detailed provisions of the Act of 1845. That Act was a consolidation of standard clauses usually inserted in private Acts, as appears from its title and preamble. It possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater. The other is that the legislation recognizes only two kinds or categories of compensation to the owner from whom land is taken: (1.) the fair value to him of the land taken, and (2.) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection. For compulsory acquisition those are the only two kinds of statutory compensation. There is a third kind given by the Act, namely, by s. 68, but that has nothing to do with compulsory acquisition. It is a remedy for injuries caused by the works authorized by the Act to the lands of an owner who has had none of his land taken in that locality. The remedy is given because Parliament, by authorizing the works, has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damages at law. The rights conferred by s. 68 have no direct or positive relevance to the question we have to decide, but negatively the section is important, just because there is nothing in it, in my opinion, which bears on our question. Whether the words "taken for or" in the second line of s. 68 have any meaning or were a mere clerical error, it is unnecessary in the present case to speculate, for it is notorious that s. 68 has always been construed as applying only to lands not held with lands taken. I say no more, therefore, about s. 68.

I come now to the essential point. As I have already indicated inferentially, there is in the Act of 1845 no express provision giving compensation for disturbance, or for any of the similar matters to which s. 2, r. 6, of the Act of 1919 refers, which for brevity I will treat as included in the word "disturbance," the more suitably so as the claim in issue in the appeal is for disturbance proper. If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1.) for the value to him of the land, and (2.) for injurious affection to his other land, it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (1.), that is, in the fair purchase price of the land taken. That conclusion is consonant with all the decisions, so far as I can discover.

The Act is very loosely drawn, and there is little attention paid in it to accuracy of language, but with regard to the scope and purpose of the grant of compensation for the value of the land taken or purchased from an owner, there is no ambiguity. It may parenthetically be noted that the words "purchased" and "taken" are used as synonyms. The owner is given a purchase price for the land taken which will "compensate" him for the compulsory sale. "Compensation" for "damage sustained" is expressly conferred as a separate right, and is conferred only in respect of the owner's other lands. No express provision is made anywhere in the Act about damage sustained by him in respect of his ownership or possession of the land taken. I will now refer shortly to the relevant sections.

Power is given by s. 6 to purchase by agreement "for a "consideration in money." Sect. 9 (a section dealing with vendors under disability) speaks of "the purchase-money or "compensation to be paid for any lands to be purchased or "taken." Sects. 16 to 68 inclusive are headed "and with "respect to the purchase and taking of lands otherwise than "by agreement." Sect. 18 provides for a written notice of the promoters' intention to take land (the "notice to treat"), which must "state . . . . that the promoters . . . . are "willing to treat for the purchase thereof, and as to the com-"pensation to be made to all parties for the damage that may "be sustained by them by reason of the execution of the "works," thus drawing plain distinction between price and damage, and between acquisition of land and execution of works. The first distinction is repeated and further explained in s. 38 which requires the promoters before summoning a jury to make an offer saying "what sum of money they are "willing to give" under each of the two heads of compensation, namely, purchase of the land and damage to be sustained by execution of the works. Sect. 49, which relates only to assessment by a jury, requires the jury to "deliver their "verdict separately" for the purchase money and "for the "sum of money to be paid by way of compensation for the "damage, if any, to be sustained by the owner of the lands by "reason of the severing of the lands taken from the other "lands of such owner, or otherwise injuriously affecting such "lands by the exercise of the powers of this or the special Act, "or any Act incorporated therewith." The definition of "the "damage that may be sustained by reason of the execution of "the works," for which compensation is payable, is still further defined in this section by limiting it to the case of "other lands of such owner." Sect. 63, which relates to assessments made, not by juries, but by arbitrators (and justices or surveyors), contains a similar reference to "the "other lands" of the owner, but makes it still more explicit by inserting the word "other" before the word "land" not only in respect of severance, but also in respect of injurious affection. These extracts from the only relevant sections show clearly that a claim for disturbance connected with the land taken must be made as part and parcel of the claim for purchase money. It cannot come under the head of compensation for severance or for injurious affection to the other lands of the owner, and the statute knows no tertium quid in the way of compensation. None the less, the owner in a proper case—that is, in a case where he really does incur a loss of money by disturbance due to the taking over and beyond the loss for which he is to be reimbursed in respect of the land taken—is entitled, because it has to do with the land, to have that element of personal loss taken into the reckoning of the fair price of the land, as has been held by the Courts from a very early stage. *Jubb* v. *Hull Dock Co.* (1), was decided on the language of a private Act passed in the session before that in which the Lands Clauses Consolidation Act, 1845, was passed, but its provisions have in more than one reported case been judicially regarded as similar in effect to those which I have quoted from the Lands Clauses Act, for example, by Blackburn J. in the Exchequer Chamber in *Buccleugh* (*Duke*) v. *Metropolitan Board of Works* (2), and by the same learned judge in the earlier case of *Chamberlain* v. *West End of London, &c., Ry. Co.* (3) (a case under s. 68); and in *Ricket* v. *Metropolitan Railway Co.* (4), where Erle C.J. recognized *Jubb* v. *Hull Dock Co.* (1) as in pari materia with the case of a claim under the Lands Clauses Act for compensation for personal damage in respect of the land taken. His obiter dictum was as follows: "As to the argument, that compensation is in "practice allowed for the profits of the trade where land is "taken, the distinction is obvious. The company claiming to "take lands by compulsory powers, expel the owner from his "property and are bound to compensate him for all the loss "caused by the expulsion; and the principle of compensation "then is the same as in trespass for expulsion; and so it has "been determined in *Jubb* v. *Hull Dock Co.* (1). There a

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(1) (1846) 9 Q. B. 443.

(2) (1867) L. R. 5 Ex. 221, 241.

(3) (1862) 31 L. J. (Q. B.) 201, 204.

(4) (1865) 34 L. J. (Q. B.) 257, 261.

"brewery had been taken by the defendants, and the plaintiff "claimed to be compensated for the loss of his business as a "brewer; and the Court held that he was so entitled, expressly "on the ground that the premises had been taken." Whilst accepting nearly everything there said, I venture respectfully to doubt the completeness of the analogy of damages for trespass.

In *Jubb* v. *Hull Dock Co.* (1) the jury awarded the claimant 400*l.* for the land taken (business premises) and 300*l.* for disturbance of his business there carried on. A rule nisi for a certiorari had been obtained to quash the verdict on the ground that the claim for disturbance was not authorized by the statute. Counsel showing cause submitted that "the "award for compensation for damage is correct. The intention "of the legislature clearly was that the party giving up his "property should be placed (so far as money could do it) in "the same situation as before. Justice would not be done if "the party resigning a business which is valuable to him and "might render the property valuable to a purchaser should "receive only the bare worth of the land. This additional "value may indeed be properly considered an element in the "price of the estate purchased." All possibly relevant sections of the Act are set out in the report in Queen's Bench cases. It is true that some of them contained certain additional words about compensation for damage which were not very clearly limited to the case of *other* lands, but the Court treated s. 117 as the only really material section: see the first paragraph in the judgment of the Court delivered by Lord Denman C.J. (2); and that section is in effect identical with s. 49 of the general Act of 1845. The decision has always been treated as an authority for the proposition that compensation for personal loss to the owner arising out of the eviction by statutory title is to be regarded as recoverable, if at all, only as an element in assessing the price to be paid for the land taken.

For that proposition there has been since 1887 authority of the House of Lords in *Inland Revenue Commissioners* v.

(1) 9 Q. B. 443.

(2) Ibid. 454.

Glasgow and South Western Ry. Co. (1). There a timber merchant's premises at Greenock were acquired compulsorily. A special jury assessed the compensation under s. 48 of the Scottish Act (which is identical with s. 49 of the English Act), at 52,658*l.*, including in that figure 9499*l.* for loss of business. The conveyance was presented to the commissioners for stamping, and they were of opinion that the 9499*l.* was part of the consideration for the sale. The First Division of the Court of Session held the contrary, but the House of Lords took the same view as the commissioners. Lord Halsbury's judgment covers much of the ground necessary to our decision. He said (2): "The parties may if they please agree, but if "they do not agree the price is to be ascertained as between "them, and two subjects-matter are dealt with by the statute— "one the value of the property so taken, and the other the "question of severing the property so taken from the lands "held therewith." He cited s. 48 and added: "The two "things, and the only two things, which are within the ambit "and contemplation of the statute, are the value of the lands "and such damages as may arise to other lands held therewith "by reason of the particular land which is taken being taken "from them. Now, my Lords, that seems to me to be at the "foundation of the whole argument. That was alone what "the jury in this case had power to assess, because it is "admitted that no question arises here upon the other part of "the section—no question arises here about any damage from "severance. It is admitted, therefore, impliedly, that the "only thing which the jury had here to assess was the value "of the land. . . . . We, however, must be guided by what "the language of the legislature is. Now the language of the "legislature is this—that what the jury have to ascertain is "the value of the land. In treating of that value, the value "under the circumstances to the person who is compelled to "sell (because the statute compels him to do so) may be "naturally and properly and justly taken into account; and "when such phrases as 'damages for loss of business' or "'compensation for the goodwill' taken from the person are

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(1) 12 App. Cas. 315.

(2) Ibid. 320.

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"used in a loose and general sense, they are not inaccurate "for the purpose of giving verbal expression to what everybody "understands as a matter of business; but in strictness the "thing which is to be ascertained is the price to be paid for "the land—that land with all the potentialities of it, with all "the actual use of it by the person who holds it, is to be "considered by those who have to assess the compensation." Lord Watson said (1): "As I read these provisions, the "statute authorizes, in the first place, compensation for land, "or an interest in land. By 'compensation,' is meant an "equivalent for that which the railway company take and "acquire, and which the proprietor gives up to them." The case finally establishes two principles. The first is that compensation for disturbance is just an element in the price of the land; the second, on which Lord Watson based his opinion, is that "by compensation is meant an equivalent for "that which the railway company take and acquire and "which the proprietor gives up to them." They are both of importance in the decision of the present appeal.

There is one further principle which has some slight relevance to the question before us and that is the moment of time at which the price of the land to be taken has to be ascertained. It is when the notice to treat was given. Wood V.-C. said in *Penny* v. *Penny* (2): "The scheme of the Act I take to be "this, that every man's interest shall be valued rebus sic "stantibus, just as it occurs at the very moment when the "notice to treat was given."

It may be convenient to summarize the legal principles on which I base my conclusion that the official arbitrator was (subject to one very improbable possibility) right on the facts before him in refusing to add any claim for disturbance to the price he awarded for the value of the land itself. (1.) Prima facie the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, and whether to an unwilling or a willing seller, is for this principle, so far as concerns that value, irrelevant. (2.) The estimation of that value must take into account future and potential value,

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(1) 12 App. Cas. 322.

(2) (1868) L. R. 5 Eq. 227, 236.

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including what is known as "special adaptability." (3.) It must be ascertained as at the moment when the notice to treat was given. (4.) The rule of market value necessarily presupposes the presence of the seller in the market, there offering his land for sale in a normal state for that market, that is, in a condition to attract the ruling price there. If its state is better than normal, it should attract a better price. If it is worse than normal, or if the buyer will have to spend money to bring it up to normal, the seller must expect a reduction on the normal price. (5.) In the case of a sale by private treaty or auction the seller cannot put in his pocket more than the net market value. He can recover no loss to which he is put by his decision to part with his land, but on a compulsory sale the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, because otherwise he will not be fully compensated. (6.) But here we come to the other side of the picture. The statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss.

The enunciation of this principle, the most fundamental of all, is easy enough. Its justice is self-evident, but its application to varying facts is apt to be difficult. It is not easy to spell out of it a general criterion which will afford a practical test in all cases. Let me try to illustrate the difficulty. A farmer sells his land with its farm buildings by private treaty, not intending to farm any more. The land is sold and bought as agricultural land, so that it will fetch in the market only agricultural value. The farmer may sell his stock, implements, etc., but he will get nothing for his loss by "disturbance" out

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of the purchaser. If the same farmer owner is compelled by law to sell, the statutory principle of equivalent compensation entitles him to recover his personal loss arising out of the compulsory sale in addition to the agricultural value of the land. But now suppose that his land has potential building value. As a result of the statutory compulsion he is forthwith put, by the notice to treat, in a position where he is entitled as at that moment to be paid the present building value of the land. If the land is "ripe for development" that value will represent a sum of money many times as much as the agricultural value. If he had sold voluntarily he would have had to set off his "disturbance" loss against the purchase price to ascertain the net price realized. How can it be said that, by the compulsory acquisition, he has been caused a loss which is not fully compensated by the present payment of full building value? In my opinion, there is nothing in either Act to give him anything further. I think that it is a false interpretation of the Acts to suppose that, in all circumstances and whatever the evidence, such a loss must, as a matter of law, be added to the actual price of the land to ascertain its legal price under the Act. Where, by reason of the notice to treat, an owner is enabled to effect an immediate realization of prospective building value and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on the top of the realizable building value is, in my opinion, contrary to the statutes.

It is not necessary for the present appeal to say more than that on the facts before us the official arbitrator was probably right, or, at least, may well have been right, in refusing to add to the figure of building land value anything for disturbance. In so far as his decision was one of fact we could not alter it if we would. If we were entitled to take judicial notice of the fact that the agricultural value is so small a percentage of the building value given by the official arbitrator that the total of agricultural value plus disturbance is below the official arbitrator's figure, we could dismiss the appeal,

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but I regret that we are not entitled to do this, and, as the respondent was not willing to concede that point of fact, I think the award must be remitted for the official arbitrator to deal with in the light of the judgments of the Master of the Rolls and myself. I have read with care the judgment of Goddard L.J., but in so far as his reasoning and conclusion differ from mine, I respectfully disagree with it. I agree with the order proposed by my Lord.

Goddard L.J. The question which falls for decision depends, in my opinion, on the true construction of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. To determine that question, it is, I think, necessary to consider what the law was before the Act of 1919 was passed. Under the Lands Clauses Act, 1845, compensation can be claimed where land is compulsorily acquired in respect of three matters: (1.) for the value of the land taken; (2.) for injury done or to be done to the lands held therewith, commonly called severance; and (3.) for lands or any interest therein injuriously affected by the execution of the works. The Act nowhere in terms refers to compensation for loss by disturbance, but it has always been held that, in assessing the value of the land, it is the value to the owner that has to be ascertained, and elements in the value to him are that he was carrying on business on the land which he is forced to sell and that he would have to move out of the house where he was living. In *Ricket* v. *Metropolitan Railway Co.* (1), Erle C.J. delivering the judgment of the Exchequer Chamber, put the matter thus: "The company claiming to take land by "compulsory power, expel the owner from his property and "are bound to compensate him for all the loss caused by the "expulsion; and the principle of compensation then is the "same as in trespass for expulsion; and so it has been decided "in *Jubb* v. *Hull Dock Co.* (2). There a brewery had been "taken by the defendants and the plaintiff claimed to be "compensated for the loss of his business as a brewer and the "Court held that he was so entitled." It became the common practice to claim, and for juries and arbitrators to assess, two separate sums, one for the land and another for the disturbance, but it was decided by the House of Lords in *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (1), that, while this division was a convenient method of enabling the jury to ascertain what was proper to be paid, the aggregate, however arrived at, was purchase money or compensation and was awarded as such. Thus, it will be seen that, while disturbance, which includes loss of business, was not mentioned eo nomine in the Act, it was a very real element to be taken into account in determining what the owner was to receive by way of compensation. The right to be compensated for his disturbance is provided by the Act of 1919.

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(1) 34 L. J. (Q. B.) 257.

(2) 9 Q. B. 443.

The Act of 1919 relates to the acquisition of land by the government or by local or public authorities, that is to say, to acquisition for public purposes. It substitutes an official arbitrator for any other tribunal for determining compensation, and in s. 2 lays down rules for assessment. Rule 1 abolishes any allowance, usually 10 per cent., which it was customary to allow because the acquisition was compulsory. Rule 2 substitutes for any other measure of value the value which any willing seller might obtain in the open market, and, as it has always been the law that the value is to be ascertained as at the date of the notice to treat, it follows that the value is the market value at that time. So far the owner, however unwilling he may be to sell, is to be treated as though he had himself put his land up for sale. Rules 3, 4 and 5 are immaterial to the present case, but r. 6 raises the question which has to be here determined. That rule states that the provisions of r. 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land. The latter words would clearly include severance. Now it seems to me that, while rr. 1 and 2 require that, in assessing the actual value of the land, the owner is to be regarded as a willing seller, r. 6 recognizes that in fact he is not. If the owner of a house puts it up for sale, he knows

(1) 12 App. Cas. 315.

that to obtain the market price he must give vacant possession, and he will not expect to get in addition to the price a sum to compensate him for the expense of removal. Disturbance implies that something is taking place against the will of the person disturbed. If an owner is expelled from his house, the expense he is put to in removal is in no way connected with the value of his house. It is a loss which he has suffered, as it seems to me, by being expelled, whatever the value of the house may be.

The main argument which was addressed to us, as I understand it, was this. It was said that the respondent was occupying his land as a farm; that he has been awarded compensation on the basis that the farm was a building estate and he could only realize that value by giving possession for building; and that, therefore, he must be treated as though he has disturbed himself. But would not this equally be the case were he to have been awarded compensation based on agricultural value? He could only realize that by giving possession. Mr. Beyfus admitted that, had the agricultural value been awarded, the respondent would have been entitled to compensation for disturbance, but I am unable to see wherein the difference lies. The value of the land is what it will fetch. The arbitrator has to find its value apart from any question of disturbance, and the value is the same whether the purchaser is a builder or a philanthropist who desires to present the site to the town for a public park or a local authority. Parliament might have provided that the value was to be what a willing purchaser would give if he intended to put the land to the same use as the vendor was putting it at the time of the notice to treat, but that is not what the rule says, and I see no warrant for reading it in that way.

Then the Act says that the fact that the value of the land is to be taken to be the amount it would realize if sold in the open market by a willing seller is not to affect the assessment of compensation for disturbance, which appears to me plainly to contemplate that, if the owner can show that he has been put to expense or loss from being disturbed, he is to be compensated for that in addition to receiving the value of

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his land. If it were found in the arbitration that the owner had at the time of the notice to treat put his land into the market, or was intending to do so, so that, if the authority had not exercised their powers when they did, he would none the less have sold and left the property, I agree that no compensation for disturbance could be awarded. If the owner intended to disturb himself by selling, there is nothing for which to compensate him, but that is not found to be the case here. If he intended to remain, he is disturbed by being obliged to sell against his will, and I can see no reason why he should not be compensated under r. 6 on this account.

Let me take as an illustration a case which might well arise. The owner of a house standing in a park near a town hopes and intends to end his days there. The town increases in size and perhaps extends its boundaries so as to embrace the property, and what was once a wholly rural situation becomes part of an urban district. The owner, however, continues to reside on his property and wishes to remain there, it may be for reasons of sentiment, it may be because his age or health makes him disinclined to move, or he may have business interests in the town which render residence close by desirable. His income being sufficient for his needs, he is content to forego the advantage of selling at the enhanced price which the extension of the town has caused. He has the property to leave to his descendants, who incidentally will have to pay death duties on the actual value and not on what it would have fetched as a country residence. The local authority decides to acquire it. The owner will get the value of the land, presumably the same as his executors would have realized had he died and there had been no notice to treat, but he is put to heavy expense in moving and fitting up a new house. I cannot conceive that in these circumstances he may not have recourse to r. 6 and seek to be recouped for what it has cost him to get into his new house. Nor can I see the justice of saying: " Well, had you sold half a dozen "years ago you would not have got as good a price," nor do I see anything in the Act enabling the acquiring authority to say: "You ought not to be using your property as a dwelling-"house or farm, therefore you should have nothing for being "bought out against your will."

Or, again, suppose there are two adjoining sites separately owned on the outskirts of a town, both equally ripe for development. One is vacant and uncultivated, having been bought merely in the expectation that as the town extends the value will rise and so prove a profitable investment. The other is occupied and highly cultivated as a market garden. The market price of both as building land would presumably be the same, and, if the land were compulsorily acquired, both owners would have to be treated as willing sellers. Surely the owner of the latter site could say that he was entitled under r. 6 to have compensation assessed for the disturbance to his business, for the loss of his cultivations, and the like. If he is not, I do not see that any meaning or effect can be given to r. 6. On the other hand, the owner of the vacant site could not be heard to say that he wanted to hold on to his land for another four or five years in the hope of getting a still better price. He gets the market price at the time of the notice to treat which must be taken to include any potential value for future improvement, and that is all he will get. As the learned judge pointed out, exactly the same argument could be used to exclude a claim for compensation for severance, which is a matter not directly based on the value of the land. The selling price of the land taken could, as he said, only be obtained by somebody willing to submit to the depreciation in value of the land not taken. For my part, I think that the reasoning of Atkinson J. is quite unassailable, and that to hold the contrary would be to ignore entirely the provisions of r. 6. I think also that his opinion is supported by the judgment of the Court of Session in *Venables* v. *Department of Agriculture for Scotland* (1). Their opinion, I think, exactly coincides with that of the learned judge.

I ought perhaps to say a word with regard to *Mizen Bros.* v. *Mitcham Urban District Council* (2), especially as I think that, from the language of the award, the arbitrator based his finding on that decision. The case is not very helpful as an authority, because the Divisional Court delivered no reasoned judgment but merely answered the questions propounded in the special case with a simple negative. We have been supplied with a shorthand note of the argument, and are asked to draw conclusions from the interlocutory observations of the members of the Court during the argument. That case was complicated by certain agreements under which the owners, who were market gardeners, were allowed to retain possession for certain periods, apparently to obtain the benefit of the cultivation and also to remove their greenhouses. A claim for loss of business was raised, but the principle matter that seems to have been discussed was whether the owners could claim the cost of removing the greenhouses and fixtures. If the decision means that, where the value is assessed on the footing that the site is vacant, and, therefore, more valuable than if it is encumbered with buildings, the owners cannot have the higher value and the cost of clearing in addition, I should agree, but if it means that where building value is given for farm or market garden lands no compensation for disturbance is to be awarded, I respectfully differ.

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(1) 1932 S. C. 573. (2) Unrep. July 19, 1929.

As I have already said, compensation for disturbance is one of the elements to be taken into account, under the Lands Clauses Act, in arriving at the total sum to be paid to the claimant, but it has never been held, as far as I am aware, that the right to have this element taken into account depends on the market value of the land. And in my opinion this is expressly recognized by the Act of 1919, because r. 6, in preserving the right to have compensation assessed for disturbance, refers to it in terms as a matter not directly based on the value of the land.

I think that, when the case is remitted to the arbitrator, he should be directed to assess compensation for disturbance, taking into account all such matters as could be considered under the Lands Clauses Act under this head, which would include the expense of removal, loss of business and depreciation in stock, live and dead, but not the cost of removal of buildings. For my part, I would dismiss the appeal.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for G. S. McIntire, Town Clerk, Sunderland; Maples, Teesdale & Co., for Steel, Maitland & Byers, Sunderland.*

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Apr. 23, 24; May 9.

CUMPER *v.* POTHECARY.

Practice—Payment into court—Form of notice—Adherence to prescribed form—Withdrawal or reduction of sum paid in—Procedure—Failure of plaintiff to take money out within seven days—Discretion of court or judge as to subsequent payment out—R. S. C., Order XXII., *r.* 1, *sub-r.* 3; *r.* 2, *sub-r.* 1; *r.* 3; *Appendix B, Form* 3.

R. S. C., Order XXII., r. 1, sub-r. 3, provides that the notice which a defendant is required by r. 1, sub-r. 1, to give to the plaintiff of a payment into court in satisfaction of the plaintiff's claim, "shall be in Form 3 of Appendix B, and shall state whether "liability is admitted or denied." The prescribed form should be strictly adhered to, leaving any qualification of the admission or denial of liability to be dealt with in the pleadings.

If a defendant wishes (*a*) to withdraw the whole of the sum paid in, or (*b*) to reduce the amount thereof, the proper procedure is for him to apply to the court for an order that he be at liberty to withdraw the notice of payment in, and in the case of (*a*) that the sum in court be paid out to him, or otherwise dealt with as the court may direct, and, in the case of (*b*), that he be at liberty to substitute for the original notice of payment in a notice containing a reduced amount and that the difference between the two sums be repaid to him or otherwise dealt with as the court may direct. A defendant who has paid a sum into court is not entitled as of right to resile from that step, but must satisfy the court that he has good reasons for so doing.

If a plaintiff fails within seven days to give notice of acceptance of the money paid in, in compliance with r. 2, sub-r. 1, of Order XXII., r. 3 then applies and payment out of the money can only be made under an order of the court or a judge, who have complete discretion either to make or refuse such an order.

APPEALS by defendant from orders of Atkinson J. in chambers.

On September 2, 1939, Gladys Ruth Cumper, while driving a motor-car belonging to her father, Adam Cumper, the plaintiff, was injured in a collision with a motor lorry owned by Frank Thompson (Hauliers), Ld., which had just before been in collision with a motor-car owned by the defendant, Charles Pothecary, and driven by his son and agent, Denis Charles Pothecary. Three days after the collision Miss Cumper died from her injuries, and the plaintiff, suing as the administrator of his daughter's estate under the Law Reform (Miscellaneous Provisions) Act, 1934, and personally, by writ dated March 1, 1940, began an action against both the defendant and also Frank Thompson (Hauliers), Ld., claiming 10*l.* in respect of personal expenses incurred by him as a result of his daughter's injuries, 1052*l.* 12*s.* 6*d.* special damage as administrator and damages for his daughter's pain and suffering and loss of expectation of life. The action against the second defendants, who denied negligence, was afterwards discontinued. Before defence the defendant, Pothecary, gave notice to the plaintiff of payment into court in the following terms: "Take notice that the defendant, Charles Pothecary, "has paid into court 1062*l.* 12*s.* 6*d.* and says that 10*l.*, part "of that sum, is enough to satisfy the plaintiff's personal "claim, and 1052*l.* 12*s.* 6*d.*, the other part of that sum, is "enough to satisfy the plaintiff's claim under the Law Reform "(Miscellaneous Provisions) Act, and admits negligence but "denies the damage." By his defence the defendant put in issue that the plaintiff was the father and administrator of the deceased, and, while admitting that the death of the deceased was caused by his negligence, did not admit the alleged or any damage, or that the deceased suffered much or any pain and suffering. The plaintiff did not give notice of acceptance of the payment in within the seven days prescribed by R. S. C., Order XXII., r. 2, sub-r. 1 (1). In December, 1940, the House of Lords gave their decision in *Benham* v. *Gambling* (1), in which they disapproved of large awards of damages for loss of expectation of life, and by summons dated January 30, 1941, the defendant applied to a master in chambers for an order for the payment out to him of the sum paid in in satisfaction of the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act, 1934. On January 31 the plaintiff issued a summons for an order that he be at liberty to accept out of court the whole sum of 1062*l.* 12*s.* 6*d.* paid in. On February 19 the master ordered that the sum of 10*l.*, and no more, be paid out to the plaintiff, and that the defendant be at liberty to amend his notice of payment in, so as to read: "Take notice that the defendant, "Charles Pothecary, has paid into court 1062*l.* 12*s.* 6*d.*, and

(1) [1941] A. C. 157.

"says that 10*l.*, part of that sum, is enough to satisfy the "plaintiff's personal claim, and that 350*l.*, a further part of "that sum, is enough to satisfy the plaintiff's claim under "the Law Reform (Miscellaneous Provisions) Act, and admits "negligence but denies the damage." The plaintiff appealed, and Atkinson J., reversing the orders of the master, directed (*a*) that the plaintiff be at liberty to take out of court the whole sum of 1062*l.* 12*s.* 6*d.* in satisfaction of his claims and (*b*) that the amendment of the notice of payment in by the defendant be struck out. The defendant appealed.

Beyfus K.C. and *Humfrey Edmunds* for the defendant. The order of Atkinson J. allowing the plaintiff to take out the money in court in satisfaction of his claims was wrong. Payment into court is governed by R. S. C., Order XXII. Rule 1, sub-r. 1, allows a defendant, on notice to the plaintiff, to pay into court a sum of money in satisfaction of the plaintiff's claim. Under sub-r. 2 the notice must specify the cause of action in respect of which the payment in is made. Rule 2, sub-r. 1, provides that the plaintiff may, within seven days of the notice of payment into court, accept the money in satisfaction of his claim. Sub-r. 2 provides that on payment out to the plaintiff proceedings in the action shall be stayed. Under r. 3, if the whole of the money in court is not taken out under r. 2, the money remaining in court shall not be paid out except in satisfaction of the claim and in pursuance of an order of the court or a judge. That rule gave the judge jurisdiction to make the order which he made in the present case. No reason for the indulgence extended to the plaintiff was put before the judge, and it is submitted that an indulgence of this kind ought not to be granted unless some good ground for granting it is put forward. It is not a good ground that the decision of the House of Lords showed that the plaintiff had been unwise in not accepting the money paid into court by the defendant. [GODDARD L.J. Is not your amended notice of payment into court a bad notice?] It may not be strictly in accordance with Form 3 in R. S. C., Appendix B. Neither notice nor defence was settled by counsel. But the point is whether the plaintiff is entitled to take the 1052*l.* out of court after he refused to do so in the first instance. The master had jurisdiction to make the order amending the original payment into court. It is an amendment of the pleading to strike out the plea of payment in of 1052*l.* and to insert a fresh plea of payment in of 350*l.* : see *Frazer & Haws, Ld.* v. *Burns* (1) ; *Williams* v. *Boag* (2). In the present case the plaintiff took the chance of the decision of the House of Lords going the other way, and he ought not now to be granted indulgence. There is no equity in depriving the defendant of the strong position which he is in by reason of the House of Lords decision. If the order of the judge is upheld it will result in injustice being done, and, therefore, this court has both the power and the duty to remedy it : see per Lord Atkin in *Evans* v. *Bartlam* (3).

C. L. Henderson for the plaintiff. It is a fallacy to say that the money paid into court was refused by the plaintiff. He has the right to accept money paid in in satisfaction of his claim up to the eve of trial. In *Greaves* v. *Fleming* (4) Cockburn C.J. said : " It is clear that he [the plaintiff] may "take out the money paid into court in satisfaction at a "later date than the four days. The only result, in my "opinion, is that, if so, he loses his absolute right to costs, "but he may apply for his costs under Order LV., and then "his right to them will be subject to the exercise of the judge's "discretion." See also notes to Order XXII. in Annual Practice, 1941, p. 407, and the rules of the Paymaster's Office. There is nothing in Form 3 (" Notice of Payment into Court "), on p. 1641 of the Annual Practice, which states that the money must be accepted by the plaintiff within seven days of the payment into court. A plea of payment into court with an admission or with a denial of liability is not a defence to an action. Under the existing rules payment into court is merely an offer to settle the action on those terms, and the offer is open for the plaintiff to accept until the eve of the trial of the action, but the plaintiff, in order to get his costs, must obtain an order from the court. The offer constituted by a payment into court is subject to the rules of Order XXII., which requires it to be in a prescribed form, and here the notice was bad because it failed to comply with R. S. C., Appendix B, Form 3. In *Frazer & Haws, Ld.* v. *Burns* (1) it was decided that money paid into court should not be taken out until the trial of the action. In *Williams* v. *Boag* (2) the money was ordered to be paid out because the action was at an end. A court is only entitled to refuse to permit a plaintiff to accept money paid into court in satisfaction of his claim if the money has been paid in under a mistake of fact, or if the taking out of the money would lead to the perpetration of a fraud. [He referred to *Vaughan* v. *Barnes* (3).] Courts will not interfere with an offer made between parties for the settlement of a dispute, and have no inherent jurisdiction to do so. In *Malcolm* v. *Fullarton* (4) Buller J. said: "The only "payment by which a party is bound, is that which is "made into court under a rule of court; that is a payment "on record; and the party can never recover it back again, "though it afterwards appear that he paid it wrongfully; "but that does not extend to payments between party and "party." That is the basis of the ruling that a party paying money into court cannot get it back until the trial of the action.

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(1) (1934) 49 Ll. L. Rep. 216.

(2) [1941] 1 K. B. 1.

(3) [1937] A. C. 473.

(4) (1879) 4 Q. B. D. 226, 227.

Humfrey Edmunds in reply. By his appeal against the second order made by Atkinson J., the defendant asks leave to amend his notice of payment in so that he may make an offer which, if the plaintiff accept it, will avoid the necessity of proceeding to trial. The respondent desires to make a formal offer, under the rules, of 350*l.* [SCOTT L.J. Your application to amend your payment in really means that you ask to be allowed to withdraw your original offer and make a new payment.] I do not want to amend my payment in, but to amend my notice of payment in, as a pleading. Under the old rules a defendant, if he denied liability, had to pay money in with a defence denying liability, and specifying the amount

(1) 49 Ll. L. Rep. 216.
(2) [1941] 1 K. B. 1.
(3) (1801) 2 B. & P. 392.
(4) (1788) 2 T. R. 645, 648.

of the payment in. The court had jurisdiction to allow the defendant to amend his pleading by striking out the reference to a payment in. It follows that the court also had jurisdiction to allow an amendment of the pleadings by amending the terms of the reference to the payment in. The whole object of the new rules is not to alter the principle on which payments into court are made but to relieve the judge of embarrassment in applying his individual judgment when he knows the amount of the offer which has been made. The notice of payment in is still part of the pleadings and can be amended under R. S. C., Order XXVIII. Assuming that the notice of payment into court is a bad notice, the plaintiff waived any irregularity when he applied to take out the money.

Cur. adv. vult.

1941. May 9. The judgment of the Court (SCOTT and GODDARD L.JJ. and STABLE J.) was read by

GODDARD L.J. In this case there are two appeals, both by the defendant, from orders of Atkinson J. in chambers. In the first the learned judge ordered a sum of money which had been paid into court by the defendant to be paid out to the plaintiff. On this we differ from him. In the second order he refused leave to the defendant to amend his earlier payment into court, and, in our opinion, that order was right.

[His Lordship stated the facts and continued :] The notice of payment into court was in these terms : "Take notice "that the defendant, Charles Pothecary, has paid into court "1062*l.* 12*s.* 6*d.* and says that 10*l.*, part of that sum, is enough "to satisfy the plaintiff's personal claim, and 1052*l.* 12*s.* 6*d.*, "the other part of that sum, is enough to satisfy the plaintiff's "claim under the Law Reform (Miscellaneous Provisions) Act, "and admits negligence but denies the damage." This notice is not strictly in accordance with Form 3 in Appendix B of the Rules of the Supreme Court. Order XXII., r. 1, sub-r. 3, says that the notice of payment into court which has to be served on the plaintiff shall be in that form and shall state whether liability is admitted or denied. The plaintiff, however, did not take any objection to the notice, and, as he afterwards applied for the money to be paid out to him, he clearly waived any irregularity. Nor do we think that in respect of this notice there is any substance in the objection, because it is clear enough that it intended to deny liability and the plaintiff was in no way misled. We think, however, that it is desirable for defendants, when making payments into court, to adhere strictly to the form prescribed, and, if they desire to deny liability, to say so in plain terms, without any qualification as to admitting negligence or the like which should be dealt with in their pleading and not in the notice.

The next step in the action was the delivery of a most embarrassing defence. Although the defendant admitted negligence in his notice of payment in, and by that document left it to be inferred that all that was in dispute was the quantum of damages to which the plaintiff was entitled, he put in issue that the plaintiff was the administrator or the father of the deceased. Yet he had paid in 10*l.* in respect of the plaintiff's personal loss. Then, he did not admit that the deceased sustained much pain and suffering, which can only mean that he admitted that she sustained some. Had an admission been obtained by a notice to admit facts, or an interrogatory, that the plaintiff was the administrator and father of the deceased, in our opinion the defence could only be read as one admitting the cause of action, that is to say, both negligence and damage, although, no doubt, leaving the quantum to be assessed. The plaintiff, however, did not apply to strike out the defence, apparently assuming that all the defendant desired to contest was the amount of damages.

The plaintiff did not accept the sum within the seven days prescribed by r. 2, sub-r. 1. In paying in as much as 1062*l.* the defendant was obviously influenced by the fact that at that time the courts had been awarding very substantial sums for loss of expectation of life. While the amounts differed, often very widely, it was by no means unknown for sums exceeding 1000*l.* to be awarded, even in cases where the person affected was an infant of tender years, and in

April or June, 1940, a defendant was well justified in thinking that in a case like the present his liability might be assessed at not less than 1000*l*., while the plaintiff, on the other hand, might well think that there was a reasonable chance that in the case of his daughter, aged twenty-two, with a promising career before her, who had in addition a claim for three days' pain and suffering, the award would be greater than 1062*l*. In December, 1940, however, the House of Lords gave their decision in *Benham* v. *Gambling* (1). Without attempting to lay down any hard and fast standard for measuring damages in these cases, their Lordships clearly disapproved the generous scale which had hitherto almost universally prevailed, and it was at once obvious that damages for loss of expectation of life would have to be scaled down very considerably. It is true that in the particular case under consideration by the House of Lords the loss of life was that of a child of tender years, but the speech of the Lord Chancellor clearly applies to all cases which may be brought for loss of expectation of life, and since that judgment it is clear that, while there is still room for considerable divergence in the amounts to be awarded, a sum approximating to anything like 1000*l*. must be the exception and not the rule. This decision not unnaturally caused a change of heart in both parties. The plaintiff, apparently, thought he had better take what had been paid in, if he could, rather than risk a trial in the changed atmosphere, while the defendant also repented of having paid in so much. The defendant, accordingly, took out a summons asking that the money in court should be repaid to him as the plaintiff had failed to accept it, and on the following day the plaintiff applied for leave to accept the amount paid in.

While many considerations apply equally, in the particular circumstances of this case, to both summonses, it is desirable to deal with them separately, and we will first consider that of the plaintiff. Payment into court is, and always has been, a matter depending entirely on statute or rules of court, which have the force of statute. Both the statutory provisions and the rules have been altered from time to time, and while

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(1) [1941] A. C. 157.

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it might be interesting to trace their history and the various alterations that have been made, the question we have to determine depends solely on R. S. C., Order xxii., which has existed in its present form since 1933, with one amendment in 1934, and decisions on statutes and rules which formerly obtained are of no material assistance. Rule 1 provides for payment into court in satisfaction of one or more causes of action, and provides for notice of the payment being given to the plaintiff. The notice is to be in a prescribed form and is to state whether liability is admitted or denied. Payment into court is not, and never was, a defence. Under the rules existing before 1933 payment, if made with denial of liability, could not be made before defence and had to be mentioned in the pleading, but now no mention of the fact is to be made in the defence, except in certain cases of libel or where a tender is pleaded. By r. 2, sub-r. 1, the plaintiff may within seven days accept the money in satisfaction by giving a prescribed notice. Thereupon he is entitled to receive payment of the accepted sum in satisfaction and by sub-r. 2 proceedings are then stayed. It is worthy of notice that this applies alike to payments with admission and with denial of liability, and that it is no longer possible for a plaintiff to take out money paid in with admission of liability and continue the action in the hope of getting more. By sub-r. 3 of r. 2, if the plaintiff accepts the money, which must mean if he accepts it within the seven days, he may thereupon tax his costs, unless the court or a judge otherwise order. This gives the court complete control over costs even where the money is accepted within the prescribed time, although it probably would be exceptional for the court to refuse the plaintiff his costs in these circumstances. The action is then at an end. If the plaintiff does not accept the money within seven days, r. 3 applies, and that rule provides that the money remaining in court shall not be paid out except in satisfaction and in pursuance of an order of the court or a judge, which may be made at any time before, at, or after the trial.

Mr. Henderson contended before us that, so long as the money was in court, the plaintiff had an absolute right at any time to obtain an order for payment out to him. He contended that the notice under r. 1, sub-rr. 1 and 3, was an offer which the plaintiff could accept at any time up to the eve of trial, and that the obtaining of an order from the court was mere machinery for pay office purposes. He supported this argument by citing the statement in the Annual Practice, p. 407, which reads: "Now, however, the "plaintiff may delay taking the money out of court until the "eve of trial." The answer to his contention is that there is nothing contractual about payment into court. It is wholly a procedural matter and has no true analogy to a settlement arranged between the parties out of court, which, of course, does constitute a contract. When once the seven days have expired the plaintiff can only get the money if he can obtain an order, and before the court makes an order it must consider whether it is right so to do. Mr. Henderson admitted that, if the defendant could show that he had grounds for alleging fraud or mistake which was unknown to him when he paid the money in, the court would refuse to allow the money to be paid out, but he contended that these were the only grounds on which an order could be refused.

We can see no ground for putting such a limit on the powers of the court. If the court can in any circumstances refuse an order, it is plain that in making or refusing an order the court must be acting judicially and not ministerially. If the plaintiff can accept as of right up to the eve of trial, why might he not do so during the trial? The note in the Annual Practice to which Mr. Henderson referred clearly has reference to the concluding words of r. 3, which says that an order may be made at any time before, at, or after the trial. In other words, the plaintiff may ask for an order at any time, but it does not mean that he is necessarily entitled to it. In substance the same argument was advanced by the plaintiff in *Frazer & Haws, Ld.* v. *Burns* (1), and was briefly answered by the Master of the Rolls, who inquired: "What is the good "of the seven days?" It is, in our opinion, clear that, if the plaintiff does not accept the money within the prescribed time, the court has thereafter complete discretion either to make or refuse an order. In the majority of cases, no doubt, it would only be a question of costs, whether the plaintiff should pay those incurred between the expiration of the seven days and the date of the application, but there may be many other considerations. In *Frazer & Haws, Ld.* v. *Burns* (1) money had been paid in with a denial of liability, and the defendants subsequently discovered grounds which they thought gave them a complete defence. They were allowed, on the terms of leaving the money in court, to amend their defence by withdrawing the offer they had made, which meant that the plaintiffs could not take the money out before trial. In *Williams* v. *Boag* (2) money had been paid in with an admission of liability, but had not been accepted. On discovering facts which it was admitted formed a complete defence to the action the defendant was allowed to amend, and this court ordered the money, although it had been paid in with an admission of liability, to be returned to the defendant.

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(1) 49 Ll. L. Rep. 216.

It being thus shown that the court has complete power to grant or refuse an order after the seven days have expired, ought an order to have been made in this case? We have already referred to the change that took place after the money was paid in by reason of the decision of the House of Lords. The result of that decision is to make it most unlikely that the plaintiff will recover so large a sum as 1062*l.* in respect of his daughter's death. While making full allowance for the fact that the plaintiff is entitled to recover something in respect of his daughter's suffering for three days, it would be difficult to justify so large an award, far the greater part of which must be for loss of expectation of life, in face of their Lordships' decision, and this seems to us to be a good ground for refusing the application, thus leaving the parties to proceed to trial to get the proper amount assessed. It is not clear to us exactly on what grounds Atkinson J. made the order that he did, but, considering that he gave the plaintiff the costs, we think that he may have considered that the plaintiff was entitled to an order as of right. With that we disagree, and accordingly we allow the appeal from that order.

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(1) 49 Ll. L. Rep. 216.

(2) [1941] 1 K. B. 1.

We must now consider the defendant's application to amend the notice of payment in by reducing the amount to 350*l.* When the application to withdraw the payment in came before the master, counsel for the defendant did not persist in asking that the money should all be paid out, but he obtained leave to amend his notice so that it read: "Take notice that the "defendant, C. Pothecary, has paid into court 1062*l.* 12*s.* 6*d.*, "and says that 10*l.*, part of that sum, is enough to satisfy the "plaintiff's personal claim, and that 350*l.*, a further part of "that sum, is enough to satisfy the plaintiff's claim under "the Law Reform (Miscellaneous Provisions) Act, and admits "negligence but denies the damage." The result of that amendment was that 702*l.* 12*s.* 6*d.* had been paid into court with neither an admission nor a denial of liability. It was not ordered to remain as security for any judgment the plaintiff might obtain. It was simply in the air. Such a notice is also open to the further objection that it states that the damage—that is, the whole damage—is denied, whereas the defence, as pointed out earlier in this judgment, admits damage. No such amendment ought to have been allowed, and we agree with the learned judge who reversed that order of the master.

We think it right to say what we conceive to be the proper procedure to adopt when a defendant desires to obtain leave to withdraw or reduce his payment into court. In our opinion, he should ask, if he wishes to withdraw the whole payment, for an order that he be at liberty to withdraw his notice of payment in, and that the sum in court should be paid out to him or be otherwise dealt with as the court may direct. The court will then, if it grant the application, consider whether, as in *Frazer & Haws, Ld.* v. *Burns* (1), the money should still remain in court as a security, or whether, as in *Williams* v. *Boag* (2), it should be returned to the defendant. If he wishes to reduce the payment he should apply for an order that he be at liberty to withdraw the notice already served and to substitute therefor a notice containing the reduced amount, and for

(1) 49 Ll. L. Rep. 216.

(2) [1941] 1 K. B. 1.

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an order that the difference between the two sums should be repaid to him, or be otherwise dealt with as the court may direct.

We do not, however, propose making this order now. The defendant sought an order which resulted in his serving a bad notice, and the learned judge was right in allowing the appeal and setting aside the master's order. If the defendant now wants to amend his notice he had better first take steps to amend his defence and start again, and we express no opinion whether the application, if made, should or should not be granted. Indeed, we think it is desirable to say that it must not be thought that a defendant who has paid a sum into court is entitled, as of right, to resile from that step. He must, in our opinion, show that there are good reasons for his application—for instance, the discovery of further evidence, which puts a wholly different complexion on the case, as in the two cases cited, or a change in the legal outlook brought about by a new judicial decision, as in the present case, and there may be others. Having once put a valuation on the plaintiff's case, the defendant ought not to be allowed to alter it without good reason. We think the same considerations apply if the matter comes before the court on an application by the plaintiff to have the money paid out to him. The court is not to consider merely whether the amount paid in is large or small, nor is it called on to take into account the sort of circumstances which would be proper if, for instance, it were asked to approve a settlement on behalf of an infant. Apart from matters such as fraud or mistake affecting the original payment, it should consider whether there is a sufficient change of circumstance since the money was paid in to make it just that the defendant should have an opportunity of withdrawing or reducing his payment.

With regard to costs, as each party has succeeded on one appeal and lost on the other we think there should be no costs to either side in this Court. The order in the appeal relating to the application for payment out of court to the plaintiff will be: appeal allowed, order of the judge in chambers discharged, and that of the master restored, the costs before the master and the judge to be the defendant's in any event, no costs of the appeal to this Court. In the appeal relating to the amendment, the order will be: appeal dismissed without costs, but the costs of the application to the master and of the appeal to the judge to be the plaintiff's in any event.

Orders accordingly.

Solicitors for appellant: *L. Bingham & Co.*

Solicitors for respondent: *Crossman, Block & Co., for Sharman & Trethewy, Bedford.*

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Practice—Pleading—Negative allegation in statement of claim—Traverse in defence—Negative pregnant—Particulars striking out defence—Traverse of admitted facts.

Where a negative allegation by a plaintiff in a pleading is traversed in the defence, the question whether or not the defendant can be ordered to give particulars of his plea in traverse depends on whether the traverse is a mere traverse or whether, though negative in form, the negative is pregnant with an affirmative, in which case particulars of that affirmative must be given.

The plaintiff pleaded that the defendants, in breach of their contract not to effect purchases or sales for her without her instructions, had done so "without having been authorized" by her so to do. The defendants in their defence denied "that "they effected purchases or sales without having been authorized "by the plaintiff to do so." They admitted that on that pleading they intended at the trial to set up an affirmative case and prove the existence of express authority from the plaintiff. On a summons taken out by the plaintiff for particulars of the defendants' plea denying that they had acted without having been authorized by the plaintiff:—

Held (by Goddard L.J. and Stable J., Scott L.J. dissentiente), that the defendants must give particulars of the affirmative case so set up, but only in so far as it met allegations in the statement of claim and not in so far as it dealt with particulars of those allegations.

Per Scott L.J. The plaintiff's statement of claim and particulars were so embarrassing to the defendants' pleader that the discretion of the judge in chambers, who had refused an order for particulars, should not be interfered with.

Per Stable J. While there may be exceptional cases in which a defence can be struck out on the ground that it traverses a number of facts alleged in the statement of claim which are not really in dispute but have been admitted by the defendants on earlier occasions, those cases must be rare, and the remedy available only where it is apparent that the defence is a frivolous or vexatious document not designed or presented as a serious piece of pleading. Speaking generally, there is no reason why a defendant should not put a plaintiff to the proof of his whole case.

APPEAL from Atkinson J. in chambers.

The plaintiff, Mrs. Ida Marie Joseph Pinson, claimed damages from the defendant bank for breach of contract. In her statement of claim she alleged that for some years the defendants had acted as her brokers and agents for the purchase and sale of stocks and shares and foreign currencies, and that at the material time it was an implied term of the employment that they should "carry out the plaintiffs' "instructions and not effect any purchase or sale without her "instructions."

By para. 7: "Wrongfully and in breach of the said term of "their employment . . . . the defendants . . . . effected purchases "and sales without having been authorized by the plaintiff "so to do," whereby she had suffered damage. In her particulars the plaintiff had set out some of the transactions which she alleged had been effected without her authority. By their defence the defendants denied "that they effected "purchases or sales without having been authorized by the "plaintiff to do so, either in respect to the matters alleged "in the particulars of para. 7 of the statement of claim or at all." The plaintiff, by summons, applied to the master in chambers either to strike out the defence or for particulars "of any "authority which the defendants are alleged to have had "from the plaintiff to carry out any of the transactions referred "to in para. 7 of the statement of claim which the defendants "were therein alleged to have carried out without such "authority." The master refused to make an order, and this refusal was confirmed by Atkinson J. on appeal. The plaintiff appealed to the Court of Appeal.

On the appeal to the Court of Appeal the defendants admitted that on the pleadings as they stood they intended at the trial to set up an affirmative case of authority.

Gerald Gardiner for the plaintiff.

Valentine Holmes for the defendants.

Cur. adv. vult.

1941. May 15. The following judgments were read.

SCOTT L.J. This appeal raises one question of some general importance about pleadings. The action is by a customer against a bank, carrying on foreign as well as British business,

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in respect of the buying and selling on her behalf of securities, gold sovereigns, dollars and francs, which she alleges was done negligently, or contrary to her instructions, or without her authority. As the foundation for her claim she alleges that the primary business of the bank was not banking but acting as brokers or agents for customers in the purchase or sale of securities. The plaintiff was on July 31, 1940, the date of writ issued, and still is resident and domiciled in France, she being English by birth but having been married to a domiciled Frenchman, whose widow she now is. The appeal is against an order by Atkinson J. dismissing an appeal from the Master, who refused an application of the plaintiff either to strike out the defence or to order certain particulars. The particulars asked were " of any authority which the defendants are alleged to have had from the plaintiff to carry "out any of the transactions referred to in para. 7 of the "statement of claim which the defendants were therein alleged "to have carried out without such authority." It appears from the statement of claim and from the letters therein referred to, copies of which were annexed to an affidavit by the plaintiff's solicitor, filed as evidence upon which the Court was asked to exercise its inherent jurisdiction, to strike out the defence as an abuse of process, that the plaintiff had been a customer of the bank for some years, and throughout that time had been continually engaged in speculative transactions in currencies and other investments, the purchases and sales being carried out for her sometimes by her own brokers, but more often by the bank's brokers. She appears to have had many different current accounts at the bank, " gold," " sterling," " dollars," " francs," and probably others. I am clearly of opinion that the plaintiff has not made out any case for striking out the defence but, to the extent to which in her statement of claim she alleges a sale or purchase by the bank without her authority, the question whether the defendant bank discharges its whole duty under the rules of pleading by merely traversing the plaintiff's allegation, or whether it should in the defence make a positive statement of the facts on which it relies as conferring such authority, is not an easy question to decide, and for the following reasons.

It is a well-recognized canon of pleading that the defendant need not, and, indeed, ought not to, plead to "particulars," whether contained in or delivered with the statement of claim. The reason for that canon is plain. All the material facts constituting the cause of action ought already to have been plainly stated in the pleading itself, as required by Order XIX., r. 4, the plainest and most fundamental of all the rules of pleading. The proper function of particulars is not to state the material facts omitted from the statement of claim in order, by filling the gaps, to make good an inherently bad pleading, however common that pernicious practice may have become. On this topic I made some observations in *Bruce* v. *Odhams Press, Ld.* (1), and will not repeat them beyond saying that I still hold the opinion that it is not the function of particulars to take the place of necessary averments in the pleading. Their function is to put the opposite party on his guard and prevent him being taken by surprise at the trial of an action, the "material facts" of which should have been already averred. Nor have mere statements of evidence *as such* a place in particulars, any more than in the pleading, although the dividing line between statements which contain sufficient indication to prepare the opponent's mind for what he will have to meet at the trial and mere statements of evidence is sometimes hard to draw and should not invite meticulous criticism. The essential rules of modern pleading embody a common-sense view of litigation, and, if complied with substantially and in accordance with their real intention, are well calculated to keep the cost of litigation down. No doubt, it is often a question of degree and convenience whether details of material facts should be put into the body of the pleading or reserved for particulars, and this latitude is both preserved and limited by rr. 6 and 7 of Order XIX. Insufficient instructions are no excuse for bad pleading. If a plaintiff does not, after advice, know whether he has got a cause of action or not and his pleader cannot

(1) [1936] 1 K. B. 697, 712.

discern one, the pleader is not for that reason entitled to plead badly, however much sympathy he may deserve for being called on to make bricks without straw.

With these considerations in mind I pass to the plaintiff's pleading and particulars. From the statement of claim it appears plainly that the action purports to be for damages for breach of three contractual duties in and about the sales and purchases of securities, etc. : (1.) want of care and skill ; (2.) disobedience to instructions ; and (3.) buying and selling without authority. No other cause of action is set up, and it is specially to be noted that there is no claim for an account either under Order XV., or in equity by way of surcharging and falsifying the accounts rendered by the bank. Para. 7, as it stands, and without its eight pages of particulars, is, in my opinion, bad and could have been struck out, for omission of the material facts necessary to make its indefinite allegations definite within Order XIX., r. 4, and it is none the less so because it is possible to dig out of the particulars a very few instances of alleged sales and purchases where enough " material facts " are stated to have made para. 7 a good pleading, if those statements had been incorporated in it. Mr. Holmes, for the bank, evidently took that view, and, to save costs, abstained from making an application under Order XIX., r. 7, to strike out para. 7, or from asking for a further and better statement of claim, a decision which had its good points although his application might well have succeeded had he made it, as the classic decision of *Philipps* v. *Philipps* (1) shows, by the following citations: per Bramwell L.J. (2) : "Then it is further said "this mode of pleading is unavoidable. See what the effect "of that argument is—that every pleading may be framed in "an embarrassing way because the plaintiff may say per-"adventure it is unavoidable. It not only would be an "answer to this particular case, but it would be an answer in "every case." Brett L.J. said (3) : "I think it is embarrassing "because, by a general statement, the plaintiff has prevented "the defendants from demurring, and at the same time has

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(1) (1878) 4 Q. B. D. 127.
(2) Ibid. 130.
(3) Ibid. 132.

"omitted to state the facts which he ought to have stated, "and the facts on which he will have to rely at the trial if "he has any case." Later on he said (1): "There are some "tests which show practically what the rules mean. I think "that in a pleading under the new rules such facts ought to "be stated which, if a person had had to state a special case "formerly for the opinion of the Court, he would have stated "in the special case as facts. . . . . If parties were held "strictly to their pleadings under the present system they "ought not to be allowed to prove at the trial, as a fact on "which they would have to rely in order to support their case, "any fact which is not stated in the pleadings." He continued later (2): "I will deal with the case which the plaintiff's "counsel says might exist, that the plaintiff might be really "a person entitled to the possession, but does not know "anything about the deeds which are in the possession of the "other side." And then (3): "But if he has no such admission "or evidence, and does not know what the deed is under which "he is about to claim, that is saying, in other words, that he "does not know what his claim is. If he does not know what "his claim is he has no right to make a statement of claim at "all . . . . I think that the omission of the facts and the "insertion of the general statement make this pleading embarrassing, and on this ground this pleading ought to be "struck out."

With regard to the particulars, Mr. Holmes relied in his argument before us on the canon that the defendant should not plead to the plaintiff's particulars. In addition, he made the separate point that the eight pages of particulars were so embarrassing as to afford an additional reason for the defendants not pleading to them. What, however, Mr. Holmes in fact did, was to treat the particulars as if they were an integral part of the pleading, i.e., of para. 7, and to deny all the allegations there made. His para. 4 is as follows: "The "defendants deny that they failed to act with reasonable skill "and care or that they failed to carry out the plaintiff's

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(1) 4 Q. B. D. 133.
(2) Ibid. 135.
(3) Ibid. 136.

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"instructions or that they effected purchases or sales without "having been authorized by the plaintiff to do so either in "respect to the matters alleged in the particulars of para. 7 "of the statement of claim or at all. Each and every "allegation contained in paras. 6, 7 and 8 of the statement "of claim is denied." In that paragraph his traverse was probably intended to import a denial both of the plaintiff's allegation, contained partly in para. 7 and partly in the particulars, that the bank had bought or sold on the plaintiff's behalf, and also of the allegations that it had done so without her authority, but, to put himself right, he asked leave to add after the words " or at all " the further words " or that if "they did so, they had not the authority of the plaintiff," or words to that effect. We permitted the amendment.

That the particulars were embarrassing both in form and substance is obvious. Only a few of the sentences disclose material facts which support the allegation of purchasing or selling without authority, and that is the only cause of action with which this appeal is concerned as its subject-matter. But, even so, the allegations pleaded under that head are so mixed up, on the one hand, with irrelevant statements of evidence inadmissible in a pleading, and, on the other hand, with causes of action not mentioned or even hinted at in the statement of claim—for instance, with regard to the " gold " transaction, charges of dishonesty, which could only be relevant if the plaintiff's action had been for fraud (or at least to surcharge and falsify the accounts) that the particulars are doubly embarrassing. In view of that aspect of the position, and of the resultant difficulty in which the plaintiff's pleader has put the defendants' pleader, I am not disposed to interfere with the exercise by the learned judge, affirming the master, of his discretion to refuse the plaintiff the order asked for, namely, that the defendants should give particulars of their authority from the plaintiff. So far as I can see there are only two instances, or at most three, where the plaintiff's rigmarole of particulars discloses a definite allegation of buying or selling without instructions. Lastly, the letters referred to in the statement of claim seem to me to indicate that the plaintiff knows more than she admits as to what case she has to meet.

The pure question of the law of pleading, which was discussed before us, whether, where a plaintiff charges his agent with having bought or sold without authority, a traverse by the defendant of the negative allegation of "no authority" is enough, or whether it involves the so-called "negative "pregnant" which imports a positive allegation by the defendants of which particulars can be asked, in my view, for the above reasons, ought not to be treated as calling for decision on the present appeal, but, in arriving at the above conclusion, I have assumed that, where the statement of claim clearly and sufficiently alleges a sale or purchase without authority by a person purporting to act as agent, a defendant who merely traverses may be required in his defence to plead the material facts constituting such authority. However, I express no final opinion on this question as I regard it as academic in the present appeal. In the circumstances of the present case I see nothing unjust in the learned judge's exercise of discretion, so as to bring the appeal within the principle explained by Lord Atkin in *Evans* v. *Bartlam* (1).

I think, though not without doubt after reading my brethren's judgments, for I recognize the strength of the detailed reasoning of Stable J., that the appeal should be dismissed with costs, but the appeal will be allowed as they direct.

GODDARD L.J. I have had the advantage of reading the judgment prepared by Stable J. and agree with it, but, as the Court is not unanimous, I propose to state quite shortly my reasons for thinking that this appeal should be allowed and particulars ordered. As Mr. Holmes is willing to amend para. 4 of the defence it is unnecessary to say more than that as it stood unamended it was, in my opinion, evasive and contrary to Order XIX., r. 19.

The question then arises whether further particulars of that paragraph should be ordered. The application was resisted

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(1) [1937] A. C. 473, 480.

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on the ground that, as it amounted to no more than a traverse of a negative averment, no particulars could be ordered. If it were intended to be no more than a bare traverse, I should agree with this contention, but the fundamental rule of pleading is that both a statement of claim and a defence must set out the material facts on which the party pleading intends to rely. Pleading the general issue by way of defence is no longer allowed and for the very good reason that such a plea gave no indication either to the opposite party or to the Court what the real issues were that had to be determined. A bare traverse is a perfectly good plea provided that all that is thereby intended is to put the plaintiff to proof of his case, but it may be that, concealed in a traverse, is an affirmative case, and this may well be so when the traverse is of a negative averment. If it is clear to the Court, either from the nature of the case or from the admission of counsel or otherwise, that it is intended to set up an affirmative case, so that the traverse is what has been described as a negative pregnant, it seems to me that particulars of the affirmative case ought to be delivered. Otherwise, the opposite party and the Court will be in doubt as to what issues are to be determined at the trial.

In the present case the plaintiff's advisers would not know from this defence whether they had to be prepared to meet a case that the defendants carried out some of the purchases or sales referred to in the particulars of the statement of claim under a general authority, and others under a special authority, and, if the latter, whether from the plaintiff or from an agent alleged to be authorized by her, nor whether all or any of the authorizations were express or implied. If the pleading is not such as will fairly enable the opposite party to know the case he has to meet, further particulars ought to be ordered.

I only desire to add two further observations. First, the fact that the statement of claim may be open to criticism is no reason why the defendants should not set out the answer that the defendants mean to set up at the trial. Although it may be said that the several matters of which the plaintiff complains should have been set out in separate paragraphs it is, I think, clear enough what are the subject-matters of the plaintiff's allegations, and if the defendants have an answer to them I can see no reason why they should not say what it is. Then it is said that it is open to the plaintiff to obtain the information that she requires by means of interrogatories. This means a multiplication of interlocutory proceedings, a matter which, in my opinion, should be discouraged whenever possible, because it tends to increase the cost of litigation. The defendants should state what their case is and not leave the plaintiff to find it out, if she can, by interrogating. I do not regard this as a case in which we are interfering with the exercise of discretion by the learned judge. From first to last Mr. Holmes has argued on the footing that the question is not one of discretion but of right.

I think the appeal should be allowed and on the defendants' submitting to amend para. 4 of the defence the order be as proposed by Stable J., the plaintiff to have the costs here and below in any event.

STABLE J. This is an appeal from an order of Atkinson J. made on March 21, 1941, dismissing an appeal from an order of Master Simner made on March 12, 1941. In substance, the plaintiff's application is (1.) to strike out the defence unless amended on the ground that it is an abuse of the process of the Court in that it traverses a number of allegations in the statement of claim which have already been admitted by the defendants in correspondence or elsewhere, and (2.) for particulars of one of the paragraphs of the defence.

As regards the application to strike out the defence on the ground that it traverses a number of facts alleged in the statement of claim which are not really in dispute but have been admitted by the defendants on earlier occasions, in my judgment, it is sufficient to say that, while there may be exceptional cases in which a defence can be struck out on this ground, those cases must be rare, and the remedy available only where it is apparent that the defence is a frivolous or vexatious document not designed or presented as a serious piece of pleading. In my judgment, that is not this case, and, speaking generally, I see no reason why a defendant is not entitled to put a plaintiff to prove his whole case, if so advised. It is a commonplace of pleading to put in issue a fact as to which there is no real dispute to compel the plaintiff to call a particular witness to prove that fact and so afford the defendant an opportunity of cross-examining the witness on other matters material to the case. This seems to me a legitimate and well-recognized method of pleading and one which on occasion serves a useful purpose. If the appeal were confined to this point, in my judgment, it would fail.

As regards the application for particulars, this is resisted on two grounds: (1.) that a defendant can never be compelled to give particulars of a traverse or denial, and that, where the allegation in the statement of claim is in the negative, as the traverse must involve a double negative, the existence of the double negative which is imposed on the pleader by the negative form in which the averment is set out in the statement of claim ought not to deprive a defendant of the benefit of the general rule; and (2.) that, by pleading as particulars matters which ought to have been pleaded as specific causes of action in the body of the statement of claim, the pleader has brought his troubles on himself. As to the second objection, while I agree that a defendant is not compelled to plead to particulars, but is entitled to confine his defence to the allegations set out in the body of the statement of claim, I do not think that this question arises here. Without expressing any opinion as to the form of the statement of claim, or the sufficiency or otherwise of the particulars, the plea of which particulars are sought is a traverse of an allegation set out in para. 7 in the body of the statement of claim that the defendants wrongfully in breach of a term of their employment and in breach of an alleged duty effected purchases and sales without having been authorized by the plaintiff so to do. The paragraph in the defence which we have to consider reads, so far as is material to the present appeal: "The defendants deny that they "effected purchases or sales without having been authorized "by the plaintiff to do so."

The point of principle can, therefore, in my judgment, be decided without having regard to the particulars set out in the statement of claim, with the small modification that, as Mr. Gardiner is only entitled to ask for particulars of a pleading which quite properly and in accordance with the principle stated deals solely with matters alleged in the body of the statement of claim and not with matters independently introduced under the guise of particulars, I think his application should be limited to the only sort of "transactions," namely, purchases and sales, which are referred to in the body of the statement of claim. If the plaintiff's particulars are embarrassing or insufficient either on the ground that they say too much or that they say too little—and on this point I express no opinion one way or the other—the defendants' remedy is to take the appropriate steps to have the particulars either pruned or enlarged or both, as the situation demands. It is, in my judgment, no ground on which a defendant can refuse to give particulars of his defence to say that, even though the defence may not be in accordance with the rules of pleading, the statement of claim has fallen into a like or other error. It must be remembered that the function of a pleading is not simply for the benefit of the parties, but also and perhaps primarily for the assistance of the court by defining with precision the area beyond which, without the leave of the court and consequential amendment of the pleadings, the conflict must not be allowed to extend.

It remains, therefore, to consider whether or not as it stands the passage in the defence that I have set out is sufficient or not. To determine this question it is necessary to consider the nature of a denial or traverse in a pleading. A traverse in a defence is never an assertion of fact on oath. Often it is not an assertion of fact at all, and may amount to no more than this: "Prove your allegation if you can. I do not "intend to give you any help by admitting it." Where the traverse is a mere denial or putting in issue of some positive or affirmative allegation in the statement of claim, the rule

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that a defendant cannot be ordered to give particulars really rests on the commonsense basis that there is nothing which the defendant can particularize, in which case, to say the least of it, there would be no point in ordering him to do something which ex hypothesi is impossible. Where the allegation in the statement of claim is a negative allegation, the traverse necessarily involves a double negative. When used in ordinary speech a double negative must involve an affirmative proposition, but where the double negative appears in a defence in the form of a denial of a negative allegation in the statement of claim it does not necessarily follow, by reason of the very nature of a traverse which I have tried to indicate, that a positive or affirmative statement is contained in it. It may or may not be so.

Such a traverse—that is, one involving a double negative—may fall under one of three heads: (i.) it may be a mere traverse involving no affirmative allegation; (ii.) it may be a negative pregnant which contains within the double negative an affirmative allegation; or (iii.) it may leave the matter in doubt what its true nature is. In my judgment, in the first case the defendant at the trial of the action can do no more than put the plaintiff to the proof of the negative alleged. He can seek to shake or destroy by cross-examination any evidence which the plaintiff may bring on the point, but, when once the plaintiff has established a prima facie case, the defendant on such a pleading cannot set up an affirmative case in answer because that, ex hypothesi, would be to set up a case which he has not pleaded, and that is what the rules expressly preclude him from doing. If it falls under the second head, the double negative extends beyond a mere traverse and amounts as in the present case to this: "If you establish a prima facie case "that I sold or purchased shares for you and that in so doing "I acted without authority, then I intend to call evidence to "establish that on each or some of the occasions there was "an express authority to act as I did or an implied authority "to be derived from certain facts." That, in my judgment is to set up an affirmative case of which particulars ought to be given and that, none the less, though the affirmative case is concealed, albeit imperfectly, in a negative shell. The third head may be excluded in the present case because Mr. Holmes has told us that at the trial of the action, if the pleading rests where it is, it is his intention to contend that he is entitled to set up an affirmative case and to prove the existence of an express authority of which he refuses to give particulars.

In my judgment, in each case where a negative allegation by a plaintiff in a pleading is traversed in the defence, the question whether or not defendant can be ordered to give particulars depends on whether the traverse is a mere traverse or whether, though negative in form, the negative is pregnant with an affirmative, in which case particulars of that affirmative must be given. This result seems to me to be in accordance with the rules which govern these matters, with common sense, and with the authorities in which the recognition of the importance of this distinction seems to me to be clearly recognized.

In *Weinberger* v. *Inglis* (1), particulars of a traverse involving a double negative were refused on the ground that the plea was a traverse and no more and that the defendant sought to set up no affirmative case except one pleaded in a paragraph, which was not under review, to the effect that they had acted bona fide. In that case the plaintiff, who for many years before the refusal of the committee to re-elect him had been a member of the London Stock Exchange, brought an action against the committee for this refusal. The defence of the committee was simply that, under the rules of the Stock Exchange by which the plaintiff was bound, the question of re-election was a matter to be determined by the committee from whose decision in the absence of mala fides there was no appeal. The plaintiff in the material paragraph of the statement of claim alleged that nothing had occurred since his first election to the London Stock Exchange in 1895 or now existed to render him ineligible for re-election. This paragraph the defendants traversed in their defence. It is, in my judgment, clear that, if, concealed in the double negative, the defendants had sought to embody an affirmative case that

(1) [1918] 1 Ch. 133.

they had refused re-election because of some act of professional misconduct or something of the kind, particulars of that allegation would have been ordered. Astbury J. says (1): "As a general rule the Court never orders a defendant to give "particulars of facts and matters which the plaintiff has to "prove in order to succeed, and this is especially the case "where a defendant has confined himself to putting the "plaintiff to the proof of allegations in the statement of claim, "the onus of establishing which lies upon him. The only "affirmative plea or defence raised by the defendants in this "case is in para. 9 of the defence, namely, that they, acting "bona fide and honestly in the exercise of their duty and "discretion under rule 21, did not re-elect the plaintiff last "March, because they did not deem him eligible to be a "member of the Stock Exchange for the year following. The "plaintiff asks, in the first place, for particulars of the facts "or grounds upon which they based this decision. In my "judgment he is not entitled to any such information by way "of particulars. It is unnecessary to decide upon this "application whether he is entitled to obtain any such "information by other means. The plaintiff has alleged in "paragraph 9 of his statement of claim that the defendants "did not exercise any discretion bona fide, fairly, reasonably, "or judicially in coming to the conclusion that they did. "Unless and until he establishes a case for the defendants "to answer on this issue—which is the real issue in the action "as the pleadings at present stand—the Court has no jurisdiction to sit as a Court of appeal from their decision, nor "will the Court presume that their action was not justified, "if they do not choose to state their reasons and submit them "to the Court for decision—a proceeding which they are under "no obligation to adopt and which the Court on an application "of this character has no right or duty to compel."

In *La Radiotechnique* v. *Weinbaum* (2), the plea of which particulars were sought and refused was a traverse of a negative allegation in the statement of claim, and it, therefore, necessarily incorporated a double negative. Counsel made it plain (1) that the plea was a mere traverse and contained nothing which involved any positive or affirmative allegation. Clauson J. said (2): "The defendants' case on this application "is a perfectly simple one. They say that the plaintiffs have "made certain allegations, and the onus is on them to prove "those allegations; that they, the defendants, have simply "denied those allegations, and set up no affirmative case." Later, he said (3): "What I have to ask myself in this case "is: 'does this denial involve any allegation?' I cannot "see that it does. I cannot see that the defendants are setting "up any affirmative case against the plaintiffs." The last case which I think it necessary to mention is *MacLulich* v. *MacLulich* (4), a decision of the Court of Appeal, affirming a decision of Sir Henry Duke P. There a wife had instituted matrimonial proceedings against her husband for restitution of conjugal rights. The petitioner alleged (4) that the respondent on a day named "did . . . . withdraw from "cohabitation with your petitioner, and has kept and continued "away from her without any just cause whatsoever, and from "thence hitherto has refused and still refuses to render her "conjugal rights." The respondent filed an answer with a paragraph containing these words (4): "He denies that" on the day named, "or on any other date he has without any just "cause withdrawn from cohabitation or that he has refused "or still refuses without reasonable cause to render to the "petitioner conjugal rights as alleged . . . . or at all." In that case, when once the wife proved that her husband had refused conjugal rights she had prima facie established a matrimonial grievance. The burden did not lie on her, in order to establish that grievance, to prove that she had done nothing to justify her husband in the action he had taken. It followed, therefore, that, if the husband's plea went beyond a mere denial of the refusal of conjugal rights, it must involve the affirmative proposition: "If I did refuse you conjugal "rights and you are able to prove a prima facie case of this, "I say that I had good cause for so doing," and of this

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(1) [1918] 1 Ch. 133, 137.

(2) [1928] Ch. 1.

(1) [1928] Ch. 4.
(2) Ibid. 6.
(3) Ibid. 8.
(4) [1920] P. 439.

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affirmative case, cloaked in the double negative, he was ordered to give particulars.

For these reasons, in my judgment, the defendants' counsel having admitted that the double negative in fact contains an affirmative case, he must be ordered to give particulars of what it is. For the reasons I have stated earlier in this judgment, and which have been more fully stated in the judgment of Scott L.J., I think the particulars should be limited to the authority to carry out the purchases and sales alleged and should not extend to particulars of the "transactions," a word which appears not in the body of the statement of claim but in the particulars. I will only add that, if Mr. Holmes had not made the admission he did, he would have been in no better plight, because he would have left the real nature of the traverse in doubt, in which case it would have been embarrassing. That part of the pleading in such circumstances would have been defective in that the limits of the controversy were not properly defined in accordance with the rules of the Supreme Court and should accordingly in default of amendment have been struck out.

Appeal allowed.

Solicitors for appellant: *C. Grobel, Son & Co.*
Solicitors for respondents: *Linklaters & Paines.*

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Criminal Law—Offence against Regulations—Penalty increased by later Order in Council—Applicability of increased penalty to offence already complete—Interpretation Act, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2—*Defence* (*General*) *Regulations,* 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 92—*Defence* (*Finance*) *Regulations,* 1939 (*St. R. & O.* 1939, *No.* 1620; *St. R. & O.* 1940, *No.* 929), *regs.* 5 (1.), (2.); 9.

Justices—Appeal—Case stated—Application for—Form—Several informations—Reference in application to "an information" and "a case."

By reg. 5 (1.) of the Defence (Finance) Regulations, 1939, every person entitled to sell or procure the sale of any foreign currency is required to offer it, or cause it to be offered, for sale to the Treasury; and reg. 5 (2.) imposes a similar obligation with regard to assigning to the Treasury rights to receive credits or balances in foreign currency. By reg. 9, which incorporated Part V. of the Defence (General) Regulations, 1939, the maximum penalty for an offence against the Defence (Finance) Regulations was that prescribed in reg. 92 of the General Regulations, namely, on summary conviction, three months' imprisonment, or a fine not exceeding 100*l.*, or both. On June 11, 1940, a further Order in Council (St. R. & O. 1940, No. 929) amended the Defence (Finance) Regulations as follows: "Where any person is convicted "of an offence against any of these Regulations in relation to any "security, currency, gold, banknote, postal order, bill, note, "debt, payment or goods, the maximum fine which may be "imposed on him shall be such fine as is authorized by . . . . "reg. 92 of the Defence (General) Regulations, 1939, or a fine "equal to three times the value of the security, currency, gold, "banknote, postal order, bill, note, debt, payment or goods, "whichever is the larger."

Three pairs of informations (in identical terms except as to amounts) under reg. 5 (1.) and 5 (2.) of the Defence (Finance) Regulations were preferred by the Director of Public Prosecutions against (1.) A. E. L. and B. C. L., (2.) A. L. (a different person from A. E. L.) and (3.) R. L., charging them with offences against those regulations between September 3, 1939, and May 11, 1940, in respect of various sums of United States dollars. All the respondents admitted the offences, and the only question before the magistrate was whether, as the prosecution contended, he was entitled, in imposing penalties, to have regard to the Order in Council of June 11, 1940, and impose fines up to three times the value of the currency (which greatly exceeded 100*l.*), or whether, as the respondents contended and as the magistrate held, the offence being complete before the date of the Order

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in Council, he was limited to a maximum fine of 100*l.* in each case. The magistrate having accordingly imposed fines not exceeding 100*l.*, the Director of Public Prosecutions applied for a case stated. The application in writing, headed "Public "Prosecutor *v.* A. E. L., B. C. L., R. L. and A. L.," referred to the hearing of "an information." The magistrate stated three cases, one in respect of each pair of informations:—

Held, on a preliminary point, that since no information was preferred against all the respondents jointly, the application in writing was clearly referable to more than one information, and the magistrate was entitled to treat it as referring to all the informations and to state cases accordingly.

Held, on the substantive question, that the language of the amending Order was clear and unambiguous in imposing the increased penalty on any person thereafter convicted, and that the cases must be remitted for the magistrate to consider the penalty on the basis of that Order.

CASES stated by the Metropolitan Chief Magistrate.

An information was preferred at Bow Street Police Court by the appellant, the Director of Public Prosecutions, against the respondents, Antony Ernest Lamb and Bertrand Cardain Lamb, for that they between September 3, 1939, and May 11, 1940, at Whitehall, London, S.W., being persons resident in the United Kingdom, who between the said dates were entitled to sell or procure the sale of foreign currency, to wit, 212,533·23 United States of America dollars, failed to offer, or cause to be offered, the said foreign currency for sale to His Majesty's Treasury, contrary to reg. 5 (1.) of the Defence (Finance) Regulations, 1939 (1). A second information charged the respondents with failing to assign to the Treasury the right to receive outside the United Kingdom or the Isle of Man in respect of a credit or balance at a bank, the same sum of United States dollars, contrary to reg. 5 (2.) of the Defence (Finance) Regulations, 1939. (1) Similar pairs of

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(1) The Defence (Finance) Regulations, 1939, reg. 5: "(1.) Every person in whose case "the following conditions are "fulfilled, that is to say— . . . . "(*b*) that he is entitled to sell, or "to procure the sale of, any "foreign currency to which this "Regulation applies, shall offer "it, or cause it to be offered, for "sale to the Treasury, or to "a person designated by the "Treasury for the purposes of "this Regulation, at such price "as may be determined by or on "behalf of the Treasury."

"(2.) Every person in whose "case the following conditions informations, differing only in the amounts of the currency alleged to have been withheld, were also preferred against (1.) Richard Lamb and (2.) Antony Lamb, a different person from Antony Ernest Lamb. All six informations were heard together on September 4, 1940, when all the respondents admitted the truth of them.

Before June 11, 1940, by virtue of reg. 9 of the Defence (Finance) Regulations, 1939, and reg. 92 of the Defence (General) Regulations, 1939, the maximum fine for each of these offences was 100*l*. An Order in Council (St. R. & O. 1940, No. 929) dated June 11, 1940, amended reg. 9 by substituting "a fine not exceeding 100*l*. or a fine equal to three times the "value of the security, currency, etc., whichever is the larger."

"are fulfilled, that is to say— ". . . . (*b*) that he is entitled to "assign, or procure the assignment "of, any right to receive, in "respect of any credit or balance "at a bank, payment of any "amount in a foreign currency to "which this Regulation applies, "shall, unless the Treasury or "a person designated by the "Treasury for the purposes of this "Regulation, gives him notice to "the contrary, do all things "necessary for the purpose of "assigning that right to the "Treasury or to a person so desig-"nated."

Reg. 9, para. 1: "The pro-"visions of Part V. of the Defence "(General) Regulations, 1939, shall, "subject to the subsequent pro-"visions of this Regulation, apply "for the purpose of the enforce-"ment of these Regulations, and "otherwise in relation thereto, "as if in the said Part V. and in "the Second Schedule to those "Regulations any reference to "those Regulations included a "reference to these Regulations."

By the Defence (General) Regulations, Part V., reg. 92; para. 1: ". . . . A person guilty "of an offence against any of these "Regulations shall (*a*) on summary "conviction, be liable to imprison-"ment for a term not exceeding "three months or to a fine not "exceeding one hundred pounds, "or to both such imprisonment "and such fine."

By St. R. & O. 1940, No. 929, dated June 11, 1940, reg. 9 of the Defence (Finance) Regulations, 1939, was amended by the addition of the following paragraph: "(3.) Where any person is con-"victed of an offence against any "of these Regulations in relation "to any security, currency, gold, "banknote, postal order, bill, note, "debt, payment or goods, the "maximum fine which may be "imposed on him shall be such "fine as is authorized by "paragraph (*a*) of reg. 92 of "the Defence (General) Regula-"tions, 1939, or a fine equal to "three times the value of the "security, currency, gold, bank-"note, postal order, bill, note, "debt, payment, or goods, which-"ever is the larger."

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Under the provisions of reg. 9 as so amended the maximum fine which could have been imposed on the respondents, Antony Ernest Lamb and Bertrand Cardain Lamb, in respect of each offence was 158,214*l.* which was three times the value of 212,533.23 United States dollars at the prevailing rate of exchange of $4.03 to 1*l.* In the other cases the maximum fines on this basis also greatly exceeded 100*l.*

On the part of the appellant it was contended that in imposing fines on the respondents the magistrate was entitled to have regard to the amended reg. 9, and that his jurisdiction was accordingly not limited to a fine not exceeding 100*l.* but extended to a maximum of three times the currency withheld in each case.

On the part of the respondents it was contended that the offences were complete before June 11, 1940, and that, accordingly, the magistrate's jurisdiction was limited to a maximum fine of 100*l.* in respect of each offence.

The magistrate's attention was called to the Interpretation Act, 1889, s. 38, sub-s. 2 (1), and to *Att.-Gen.* v. *Lockwood* (2), *Robinson* v. *Emerson* (3), *Rex* v. *Chandra Dharma* (4), *Hickson* v. *Darlow* (5), *In re School Board Election for the Parish of Pulborough. Bourke* v. *Nutt* (6), *Grocock* v. *Grocock* (7). He convicted the respondents on each information. Being of opinion that their contention was correct, he imposed fines of 100*l.* in respect of each offence on Antony Ernest Lamb and Bertrand Cardain Lamb, but stated that, if he had been satisfied that the appellant's contention was right, he would have considered imposing considerably heavier fines. In the other cases he imposed fines not exceeding 100*l.* The question for the opinion of the Court was whether the magistrate came to a correct determination in law.

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(1) The Interpretation Act, 1889, s. 38, sub-s. 2: "Where "this Act or any Act passed after "the commencement of this Act "repeals any other enactment, "then, unless the contrary inten- "tion appears, the repeal shall "not . . . . (*c*) affect any right, "privilege, obligation, or liability "acquired, accrued, or incurred "under any enactment so repealed; "or (*d*) affect any penalty, for- "feiture or punishment incurred "in respect of any offence com- "mitted against any enactment so "repealed."

(2) (1842) 9 M. & W. 378, 397.

(3) (1866) 4 H. & C. 352, 355.

(4) [1905] 2 K. B. 335, 338.

(5) (1883) 23 Ch. D. 690.

(6) [1894] 1 Q. B. 725.

(7) [1920] 1 K. B. 1.

The appellant applied in writing for a case stated in the following form:

"Public Prosecutor *v.* Antony Ernest Lamb, Bertrand "Cardain Lamb, Richard Lamb, and Antony Lamb.

"Whereas an information wherein I, the undersigned, was "informant, was heard before and determined by the Court "of Summary Jurisdiction sitting at Bow Street Police Court "on September 4, 1940. Now I, the undersigned, being "dissatisfied and aggrieved with your determination upon the "hearing of the said information as being erroneous in point "of law, hereby, pursuant to the provisions of the Summary "Jurisdiction Act, 1857, and the Summary Jurisdiction Act, "1879 (1), apply to you to state and sign a case setting "forth the facts and grounds of your determination and "the grounds on which the proceedings are questioned, for "the opinion thereon of the King's Bench Division of the "High Court of Justice."

G. D. Roberts K.C. and *Christmas Humphreys* for the respondents. It is submitted, as a preliminary point, that this Court has no jurisdiction to hear this appeal, because the requirements of the Summary Jurisdiction Act, 1857, s. 2, the Summary Jurisdiction Act, 1879, s. 33, and the Summary Jurisdiction

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(1) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2: "After the hearing and determination by a justice or justices "of the peace of any information "or complaint which he or they "have power to determine in a "summary way, by any law now "in force or hereafter to be made, "either party to the proceeding ". . . . may, if dissatisfied with "the said determination as being "erroneous in a point of law, apply "in writing within three days "after the same to the said justice "or justices to state and sign a "case . . . . for the opinion "thereon of one of the Superior "Courts of Law . . . ."

Summary Jurisdiction Act, 1879, s. 33, sub-s. 2, authorized the making of rules with regard to the form and method of application for a case stated under that Act.

Summary Jurisdiction Rules, 1915, r. 52: "An application "to a court of summary jurisdiction under s. 33 of the "Summary Jurisdiction Act, "1879, to state a special case, "shall be made in writing."

Rules, 1915, r. 52, have not been complied with. In the present proceedings there were six informations and six convictions, all involving different results, and if it had been desired that a case should be stated on each of those informations there should have been either six separate applications in writing to the magistrate, or else one application which clearly indicated that a case was required in respect of each of the six informations. But the copy received by the respondents of the application sent to the magistrate by the Director of Public Prosecutions referred only to "an "information," and asked him to state and sign "a case," although it was headed with the names of all four respondents. On that application the magistrate could only state one case, and this Court has jurisdiction to hear only one case; but the document does not indicate in any way in respect of which respondent the magistrate is asked to state a case. It is immaterial that the magistrate has in fact stated three separate cases covering six informations. Statutory requirements are conditions precedent to jurisdiction and cannot be waived: see *Duke of Atholl* v. *Read* (1); *South Staffordshire Waterworks Co.* v. *Stone* (2).

Valentine Holmes for the appellant. It is not contested that compliance with the statutory rules is a condition precedent to jurisdiction, but the Courts have never been eager to assist a party seeking to take advantage of a technical objection. It must not be assumed that when a magistrate receives an application for a case to be stated he is a complete stranger to the matter in question. Seeing the heading of the application, he would know that he was asked to state a case with respect to the information against each of the four defendants. "An information" and "a case" must be read distributively.

[HUMPHREYS J. All the members of the Court are of opinion that the preliminary point fails and we will give our reasons when we deal with the matter of substance.]

Valentine Holmes for the appellant. The magistrate was wrong in holding that he had no power to impose the higher penalty

(1) [1934] 2 K. B. 92.

(2) (1887) 19 Q. B. D. 168.

under the Order in Council of June 11, 1940. If he had done so he would not have been imposing a penalty retrospectively, no question of punishment arose until after the trial and conviction of the respondents. The Order in Council of June 11 did not repeal reg. 9 of the Defence (Finance) Regulations so that "any penalty . . . . incurred in respect of any offence "committed against" the regulation "so repealed" is not to be affected under s. 38, sub-s. 2 (*d*), of the Interpretation Act, 1889. In *Rex* v. *Jackson* (1) it was held that a statute which prohibited the making of silver plate under the standard alloy was not repealed by any of the subsequent statutes against the same offence, but that they only added accumulative penalties. That is not only a general rule, but it is common sense, and obviously what the legislature intended. The cases should be sent back for the reconsideration of the penalties to be imposed.

G. D. Roberts K.C. and *Christmas Humphreys* for the respondents. There is a recognized principle that without clear words to that effect a statute will not operate to create new obligations or disabilities with regard to transactions which are complete at the time of the passing of that statute. Further, by s. 38, sub-s. 2 (*d*), of the Interpretation Act, 1889, the provisions of reg. 92 of the Defence (General) Regulations, so far as they affect the Defence (Finance) Regulations, were impliedly repealed by the order of June 11, 1940, and the provisions of the earlier regulation are not to be affected by that implied repeal. Whether or not it is correct to use the word "retrospective," clearly what the Crown is seeking is the creation of an additional punishment after an offence is complete. Without very clear and unambiguous language the Court will not, it is submitted, hold that a penalty imposed in June, 1940, can apply to an offence committed in September, 1939. In *Rex* v. *Chandra Dharma* (2) it was held that a statute dealing only with procedure applies to past events as well as to future events, but the order of June, 1940, does not merely deal with procedure. The order of June, 1940, is ambiguous, and, therefore, that meaning of it should be accepted which presses

(1) (1775) 1 Cowp. 297.

(2) [1905] 2 K. B. 335, 339.

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least hardly on the persons to be penalized. *In re School Board Election for the Parish of Pulborough. Bourke* v. *Nutt* (1), and *Reg.* v. *Griffiths* (2) were also referred to.

Humphreys J. A preliminary point was taken on behalf of the respondents, namely, that, although there were six informations, there was only one application in writing to state a case. Therefore, Mr. Roberts argues, at least as regards five of those informations, the magistrate had no power to state a case, and this Court has no power to hear those cases. Mr. Roberts goes on, and for my own part I am disposed to agree with this part of his argument, to say that, if he is right that there was with regard to five out of the six informations no application in writing, the one application in writing which does exist cannot be allocated at the pleasure of the Court—and still less of the appellant who was the prosecutor in the court below—to any particular information, so that it would follow that there was here no application in writing for a case at all.

The document in question is before the Court. It is addressed to the chief magistrate at Bow Street Police Court, it is in proper form, and it recites: "Whereas an information "wherein I, the undersigned, was informant"—it is signed by the Director of Public Prosecutions—"was heard before and "determined by" the court of summary jurisdiction, "now "I, the undersigned, being dissatisfied and aggrieved with "your determination upon the hearing of the said information "as being erroneous in point of law, hereby . . . . apply to you "to state and sign a case" and so forth. That document, however, is headed "Public Prosecutor *v.* Antony Ernest "Lamb, Bertrand Cardain Lamb, Richard Lamb and Anthony "Lamb." As there was no information, as the magistrate would remember, which included all those names, it follows that this was an application in respect of more than one information and must be read as such. It must, at least, be read as being an application to the magistrate to state a case at the instance of the Director of Public Prosecutions with regard to the summonses against three people (treating the first two as one individual, because they were jointly charged) who were summoned on different informations. The difficulty arises, says Mr. Roberts, that against each of those individuals there were two informations. The question, therefore, arises whether that document can reasonably be construed as being an application to state a case with regard to all the informations, in each of which one point of law arose, common to all, namely, the maximum penalty which the magistrate had power to inflict in the circumstances. It is to be observed that the magistrate and those who had to deal with this matter were under no misapprehension about the intention of the appellant in asking for a case to be stated, because in fact three cases have been stated dealing with all six informations. That was undoubtedly the intention of the prosecution when putting forward the application.

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(1) [1894] 1 Q. B. 725.

(2) [1891] 2 Q. B. 145.

In my opinion, this preliminary objection could only be sustained if in law a magistrate was unable to state one case in respect of more than one information, so that here there had to be six cases stated in respect of the six informations. In that event there might have been something to be said for the allegation that there must be in terms, though not necessarily in different documents, application for six separate cases. It is, however, quite unnecessary that there should be six cases, and, indeed, it is conceded that three cases are quite sufficient, because the two informations against each respondent relate to the same point and may be included in one case for the opinion of this Court. I know of no reason why half a dozen different cases heard by the same magistrate on the same day against different people should not be included in one case stated, assuming always that they raise precisely the same point.

I think that the matter is made even more clear when one realizes that there is no statutory form for the application to state a case. Ancient text books as well as modern editions of those text books all agree that the practice always has been to make the application in the vaguest possible form and not to mention the particular information which is referred to.

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Humphreys J.

It is not even necessary to state what is the point of law which it is desired to raise. Those who are familiar with these matters know that it is quite common practice for a magistrate to whom an application is made to state a case to reply: "I will state a case if you will statisfy me that some point of "law was raised and tell me what is the point of law on which "you want me to state a case," but until that is done this vague form is regarded as sufficient. That is because all that is required is that within the prescribed time, which is now seven days, an application in writing must be made to the magistrate asking him to state a case regarding the matter which he has decided. My view is that the document in question in this case can be reasonably construed, as I think it must be taken to have been construed by the magistrate, as being an application to him in writing to state a case on each of the informations which were heard by him on the same day against those persons whose names appear at the head of the application, namely, Antony Ernest Lamb and Bertrand Cardain Lamb (1.), Richard Lamb (2.) and Anthony Lamb (3.). The preliminary point accordingly fails.

I now turn to the point on which the magistrate stated these three cases. We have been told that it is sufficient for this court to deal with one of them inasmuch as they are identical in all respects except for the amount both of the alleged maximum penalty which could have been enforced and of the penalty which was in fact imposed by the learned magistrate. I take the case stated in the proceedings against Mr. Antony Ernest Lamb and Mr. Bertrand Cardain Lamb. The case states that there were against those two persons two informations, the first being that they, being persons who were entitled to sell certain foreign currency, failed to offer that foreign currency for sale to His Majesty's Treasury, while the second information charged that they, being persons who were entitled to assign the right to receive certain dividends in respect of certain credits, failed to do all things necessary to assign that right to His Majesty's Treasury. The respondents admitted the truth of those informations and the magistrate had nothing to do but to apply his mind to the question of the appropriate penalty.

Those matters came before the learned magistrate on September 4, 1940. The informations had been laid on August 17. The offences were alleged to have been committed between September 3, 1939, that is, the day when these Defence (Finance) Regulations came into force, and May 11, 1940, that being the date, as we were told, when in fact disclosure was made by the defendants. On September 4, 1940, therefore, the magistrate, looking to see what his powers were in the matter, would find them contained in reg. 9 of the Defence (Finance) Regulations. [His Lordship read the material parts of reg. 9 as amended, and of reg. 92 of the Defence (General) Regulations.] By September 4, 1940, however, the additional power had been provided by an Order in Council of June 11, 1940, as an alternative to imposing a fine of 100*l.*, to impose a fine equal to three times the value of the currency or whatever it may be which is the subject of the breach of the regulation. The fine may be whichever sum is the larger. The law was, therefore, altered at a date considerably before the laying of the informations and to a greater extent before the hearing of them. The Order in Council provides as follows: "Regulation 9 of the Defence "(Finance) Regulations, 1939, shall be amended as follows" and then the only one of the amendments which is material in this case: "at the end of the regulation there shall be "added the following paragraph" and the paragraph which I have already read is then set out in the Order in Council.

In my opinion, the magistrate was wrong in the view which he took of his power. He failed, in my opinion, to give effect to the perfectly plain and quite unambiguous terms of the regulation which defines that power. I cannot myself conceive of any language less open to discussion than that of the order of June 11, 1940: "Where any person is convicted of an offence against any of these regulations in relation to" certain matters "the maximum fine which may be imposed on him "shall be . . . . a fine, equal to three times the value of the "security, currency" and so forth. In my view, this case falls to be decided simply and solely on those perfectly plain words. The duty of the magistrate was to take into consideration whether in the circumstances of the case he ought to send these persons to prison or to fine them, and, if the latter, what amount, not more than three times the value of the currency, it was right to impose.

The magistrate, however, seems to have been persuaded that there was some doctrine which would prevent him reading the terms of that regulation in their ordinary sense. The doctrine to which his attention was called, as one gathers from the authorities which are said to have been quoted to him and some of which have been quoted to us, is very well known. It may be put perhaps in these words, that where a statute alters the rights of persons, or creates fresh liabilities with regard to persons or imposes obligations on persons, it ought not to be held to be retroactive in its operation unless the words are clear, precise and quite free from ambiguity. For such a proposition there is the most ample authority. I will take only two cases in which the matter has been discussed in this Court in recent years. The last occasion, so far as I am aware, was in 1920, when in *Grocock* v. *Grocock* (1) the Court had to deal with the doctrine in its relation to the powers of a wife to recover arrears under a maintenance order. By s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, payment of any sum due under that Act might be enforced in the same manner as under an order of affiliation, and a subsequent statute had removed bastardy from among the things regarding which there was a time limit in respect of recovery of arrears. The second case, *Rex* v. *Chandra Dharma* (2), is a leading case on the subject. It was a special case stated for the consideration of the Court for Crown Cases Reserved in 1905. The judgments of Lord Alverstone C.J. and Channell J. state the propositions to which I have referred quite clearly and succinctly. There are, as Mr. Roberts has said quite correctly, many other authorities to the same effect, but all of them depend on there being in the language of the statute something which raises a doubt

(1) [1920] 1 K. B. 1.

(2) [1905] 2 K. B. 335, 338, 339.

whether or not the statute is to be deemed to be retroactive in its operation. None of these authorities suggests any doubt about the undoubted right of Parliament or of His Majesty by Order in Council, so long as it is intra vires the statute which authorizes it, to make any alteration in the law which is thought right. The doctrine as to the retroactive effect of a statute or Order in Council, while I fully subscribe to it and would willingly give full effect to it in any case where it was possible to do so, has no effect where the language of the statute or, as in this case, of the Order in Council, under consideration is free from ambiguity.

For that reason I take the view that the magistrate was wrong in considering that that doctrine hampered him in any way in giving effect to the perfectly plain language of this Order in Council. It was totally immaterial for him to consider what would have been his powers if this matter had come before him six months earlier than it did. He was sitting on September 4. All that he was concerned with was what were his powers on September 4. His powers were clearly stated in the order which had existed since June 11.

Out of respect for the argument which has been addressed to us by Mr. Roberts, I think that I ought to say something about the second limb of his argument. Mr. Roberts relies on s. 38, sub-s. 2, of the Interpretation Act, 1889, as affecting this matter, and he argues that the Order in Council of June 11, 1940, repealed reg. 9 of the Defence (Finance) Regulations, and that that repeal is not to affect any penalty incurred in respect of any offence committed against the enactment so repealed. In my view, s. 38 of the Interpretation Act, 1889, has no sort of relation to this matter. I think that Mr. Roberts, boldly though he approached his fences, found too many and too formidable obstacles even for him to get over. In the first place, it will be observed that s. 38, sub-s. 2, provides: "Where this Act or any Act passed after the commencement "of this Act repeals any other enactment . . . ." What Act has repealed anything? The order of June 11, 1940, is not an Act. It is an Order in Council. The sub-section itself draws a clear distinction between an Act of Parliament and an "enactment," which may mean something other than an Act of Parliament, but an Act means an Act of Parliament. The first point which seems to me to be fatal against Mr. Roberts's argument is that there is no Act here which has repealed anything.

The next point is whether, assuming that the Order in Council is an Act, it has repealed some enactment and, if so, what? By its terms it does not pretend to repeal anything. Its language is: "His Majesty, in pursuance of" various powers "is pleased, by and with the advice of His Privy Council, to "order and it is hereby ordered that reg. 9 of the Defence "(Finance) Regulations, 1939, shall be amended as follows." Where is there room for the argument that reg. 9 has been repealed? There is none.

If reg. 9 has not been repealed, has anything else been repealed? I am not sure whether the argument proceeds the length of saying that reg. 92 of the Defence (General) Regulations has been repealed. Obviously it has not. If it has, there is no sanction to be found in the whole of the Defence Regulations for any offence committed against them, for that is the regulation which gives general power to punish any infraction of the regulations. I only add that I find it impossible to find in s. 38 of the Interpretation Act, 1889, anything which in any way limits the power of His Majesty in Council to do that which has been done here, that is, to amend the terms of a regulation in regard to the maximum penalty enforceable.

That being so, it is unnecessary to discuss whether, if one were to assume that there was by some Act of Parliament a repeal of reg. 9, that could be said to "affect any right, "privilege, obligation, or liability" or "any penalty, forfeiture, "or punishment incurred in respect of any offence committed "against any enactment so repealed." In my view, that statute has no application to this matter, unless, indeed, it can be said that there is a general rule of law that the alteration, by statute, or regulation or order having the force of a statute, of the existing law regarding a penalty effects a repeal. I can only say that the great authority of Lord Mansfield appears to be to the contrary effect. In *Rex* v. *Jackson* (1), that great judge, declaring the opinion of himself and the other members of the Court, observed: "Now it is a general rule "that subsequent statutes which add accumulative penalties "do not repeal the former statute."

In the result, the cases should go back to the chief magistrate with a direction to that effect.

TUCKER J. I agree with what my Lord has said with regard to the preliminary point taken by Mr. Roberts and do not wish to add anything with regard to it.

As to the substance of the matter, the first point to which I wish to refer is the submission of Mr. Roberts that s. 38, sub-s. 2, of the Interpretation Act, 1889, applies in this case. I do not think that that sub-section does apply, because I do not think that there has been any repeal. There clearly has been no express repeal, but Mr. Roberts argued that reg. 92 of the General Regulations was impliedly repealed by the Order in Council of June 11, 1940. That order provided that "reg. 9 of the Defence (Finance) "Regulations, 1939, shall be amended as follows." Then there appear words which impose the increased penalty. In my view, reg. 92 has not been repealed either expressly or impliedly. What has happened has been that a different regulation, namely, reg. 9 of the Defence (Finance) Regulations, has been amended in the manner set out in the order of June 11, 1940.

I turn now to what I regard as the much more important point and one which merits serious consideration. There Mr. Roberts relies upon what he says is the recognized principle that without clear words a statute will not operate to create new obligations with regard to matters which are complete, and he relies on the words used by Lord Alverstone C.J. in the case of *Rex* v. *Chandra Dharma* (2). In that case the Lord Chief Justice said: "Unless the language is clear, a statute ought "not to be construed so as to create new disabilities or obliga- "tions, or impose new duties in respect of transactions which

(1) (1775) 1 Cowp. 297, 298. (2) [1905] 2 K. B. 335, 338.

"were complete at the time when the Act came into force." It is agreed that that is the principle applicable and that when one is dealing with criminal matters that principle should be very strictly applied. We are here dealing with a criminal matter. Mr. Holmes contended that this amendment had not had what is commonly called a retrospective effect. I agree that the word used by my Lord, "retroactive," is more correct. I merely use the word "retrospective" for convenience, as it has so often been used. Mr. Holmes says that this amendment, which is now incorporated in the Defence (Finance) Regulations, reg. 9, uses the words "Where any "person is convicted of an offence," and, having come into force on June 11, it deals with a future state of affairs, namely, a conviction in the future. In that sense, he argues, there is nothing retrospective about the order. I am unable to agree with that submission. It is true that, so far as the creation of any substantive offence is concerned, it is not retrospective. It is not making an offence something which previously was not an offence and it, of course, deals with the future when it says "Where any person is convicted" and does not refer to any person who has been previously convicted, but where I think it has a retrospective effect is with regard to the penalty which it imposes. If we suppose that next week the regulation with regard to looting was to be amended by a provision which said: "Any person convicted of looting "shall suffer the penalty of death and regulation so-and-so "shall be amended accordingly," I think it would be difficult for anybody who was next week convicted of the offence of having looted six months ago to persuade the Court that that regulation had not a retrospective effect. In my view, it clearly would have a retrospective effect qua punishment and this regulation has a retrospective effect with regard to the penalty that it imposes.

That merely throws us back on the application of the principle to a case of this kind, which is rather different from any of those in the authorities to which we have been referred. One has to look at the regulation and see what is the language used. When one finds the regulation dealing with what was then an existing and known offence and with a future conviction of a person of that offence, and when it is found to use the simple and clear language that any person convicted of that offence shall be liable to certain penalties, it is clear that the order is applicable to an offence which has already been committed. It is not a case of a regulation creating any new offence, nor is it a regulation providing for some different kind of penalty. It merely increases the amount of a monetary fine. Although I do not, I confess, like the idea of punishments being increased after the offences have been completed, none the less, the language is clear, and I think it is impossible to escape from its consequences.

For those reasons I agree that these cases must go back to the magistrate that he may apply his mind to the question whether in all the circumstances he thinks that in any of these cases he should apply the increased penalty provided by the amended regulation.

CASSELS J. I agree. On the preliminary point I am satisfied that the notice in writing which was given was a sufficient compliance with the rules. With regard to the substantial point, I confess that at first sight I did not like the idea that a man who has committed an offence may find himself liable not to a punishment which existed at the time the offence was committed, but to one which has subsequently been imposed by the law. As to the retrospective or retroactive effect of a statutory provision, dicta are to be found in a large number of cases which clearly indicate that, if the language of an Act is plain and not ambiguous, it may well have a retrospective effect. When I look at the language of this regulation, I come to the conclusion that it is perfectly plain. When the respondents, who between September 3, 1939, and May 11, 1940, admittedly committed offences against the Defence (Finance) Regulations, found themselves on September 4 before the chief magistrate at Bow Street they were on that day clearly liable to penalties which the law prescribed for this particular offence as from June 11.

In those circumstances, I agree that the cases should be remitted.

Cases remitted.

Solicitors for appellant: *Treasury Solicitor.*
Solicitors for respondents: *A. M. Longhurst & Butler.*

J. W. H.

BARRATT AND OTHERS *v.* GRAVESEND ASSESSMENT COMMITTEE.

1941
May 1, 8.

Rates — Assessment — Proposal to amend valuation list — Objection — Duty of Assessment Committee to consider all relevant matters existing at date of proposal—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-s.* 7.

On January 24, 1940, a rating authority made a proposal under s. 37, sub-s. 1, of the Rating and Valuation Act, 1925, to amend the valuation list by increasing the valuation of a "tied" public house, of which the appellants were respectively the tenant and the owners, to give effect to the decision of the House of Lords in *Robinson Brothers (Brewers), Ld.* v. *Durham County Assessment Committee* [1938] A. C. 321. The current rate for the district was made on April 1, 1939, for the year ending March 31, 1940. The appellants gave notice of their objection to the proposal on the ground that the proposed increased valuation was excessive, incorrect and unfair, in that it ignored the fact that the outbreak of war in September, 1939, and the conditions resulting therefrom, had diminished the value of the hereditament. The assessment committee allowed the proposal and fixed the value as at April 1, 1939, without allowing for the effect of the war:—

Held, that it was the duty of the committee in hearing and determining the proposal under s. 37, sub-s. 7, of the Act, to weigh all the relevant matters, including the fact that the hereditament was affected adversely by the outbreak of war, and to determine what rent a hypothetical tenant would pay on January 24, 1940, the date of the proposal, for a yearly letting.

CASE stated by Quarter Sessions.

The appellants were Cuthbert Henry Barratt, the occupier, and Russells Gravesend Brewery, Ld., the owners, of the India Arms tavern, Northfleet, Kent. The respondents were the Gravesend Assessment Committee.

The India Arms tavern was a fully-licensed public house, and was let by Russells Gravesend Brewery, Ld., to Barratt, on a tenancy whereby the tenant was "tied" in respect of all purchases of beers, wines and spirits. It was dependent for its trade to a considerable extent on persons connected with shipping on the River Thames. The outbreak of war in September, 1939, and the conditions resulting therefrom diminished the value of the hereditament. In the valuation list for the urban district of Northfleet in force on April 1, 1939, the hereditament was assessed at a gross value of 50*l.* and a net annual and rateable value of 40*l.* On January 24, 1940, the rating authority for the district made a proposal under s. 37, sub-s. 1, of the Rating and Valuation Act, 1925 (1), to amend the list in respect of the hereditament by increasing the gross value to 94*l.* and the rateable value to 75*l.*, on the ground that the existing assessment was incorrect and insufficient having regard to the decision of the House of Lords in *Robinson Bros.* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (2). On March 5, 1940, the appellants gave notice of their objection to the proposal on the grounds that the values proposed by the rating authority were excessive, incorrect and unfair, in that no regard had been had to the change in the conditions affecting the value of the hereditament caused by the war. On March 18, 1940, the assessment committee heard the proposal and objection, and determined to allow the proposal and to amend the valuation list by increasing the gross value of the hereditament to 94*l.*, and the rateable value to 75*l.*, as proposed.

On April 3, 1940, the appellants gave notice of appeal to Kent Quarter Session and the parties agreed, pursuant to s. 11 of the Quarter Sessions Act, 1849, to state this special case for the opinion of the Court. (*a*) If, in determining the value of the hereditament for the purposes of the proposal, it was correct in law to estimate the rent which might reasonably have been expected for the hereditament on a tenancy on the statutory terms commencing on April 1, 1939, in the circumstances existing or expected on April 1, 1939, and to ignore any change in such circumstances caused by the present war and occurring before the date of the proposal, namely, January 24, 1940, it was agreed that the gross value should be fixed at 94*l.* and the rateable value at 75*l.*, as determined by the respondents. (*b*) If, in determining the value, it was correct to estimate the rent which might reasonably have been expected for the hereditament on a tenancy on the statutory terms on the date of the proposal, in the circumstances existing or expected on January 24, 1940, and to ignore the fact that the rate period then current began on April 1, 1939, it was agreed that the gross value should be fixed at 80*l.* and the rateable value at 64*l.* (*c*) If, in determining the value it was correct to estimate the rent which might reasonably have been expected for the hereditament on the statutory terms if the tenancy began on April 1, 1939, but the rent payable in respect of such tenancy was fixed in the light of events which occurred between that date and the date of the proposal, and of the circumstances existing or expected on January 24, 1940, it was agreed that the gross value should be fixed at 86*l.* and the rateable value at 69*l.*

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(1) By Rating and Valuation Act, 1925, s. 37, sub-s. 1: "Any person "(including the county valuation "committee and any local author-"ity) who is aggrieved by the "incorrectness or unfairness of "any matter in the valuation list "for the time being in force .... "may make in manner provided "by this section a proposal for "the amendment of the list (in "this section referred to as 'a "'proposal')." By sub-s. 10, "Subject as hereinafter provided, "an amendment made in the "valuation list in pursuance of "this section shall, in relation to "any rate current at the date "when the proposal in pursuance "of which the amendment was "made was served on the rating "authority .... be deemed to "have had effect as from the "commencement of the period in "respect of which the rate was "made ...."

(2) [1938] A. C. 321.

The appellants contended that the value of the hereditament for the purposes of the proposal should be determined on the hypothesis set out in para. (*b*), or, alternatively, on that set out in para. (*c*). The respondents contended that the value should be determined on the hypothesis set out in para. (*a*).

The question for the opinion of the Court was whether the contention of the respondents, or either, and if so, which of the contentions of the appellants, was correct.

Harold Williams for appellants. In considering the proposal of the rating authority and the objection of the appellants it was the duty of the assessment committee to determine the value of the hereditament at the date of the proposal, and for that purpose to have regard, not only to the decision in *Robinson Bros. (Brewers), Ld.* v. *Durham County Assessment*

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Committee (1), but also to the effect of the war. The present procedure for altering a valuation list was first introduced by the Rating and Valuation Act, 1925, s. 37, and that explains why the point now raised was not brought before the Courts during the last war. Sect. 37, sub-s. 1, is in most sweeping terms. The right to make a proposal is given to any person who is aggrieved by the rate for the time being in force. It is unnecessary for him to show that he was aggrieved when the rate was made. It is sufficient if he is aggrieved when he makes his proposal and the same principle applies to an objection to a proposal. If he is aggrieved by a change of circumstance that occurs only a day before he makes his proposal he is entitled to rely on it. For the meaning of "person aggrieved" see *Rex* v. *Thanet and District Assessment Committee* (2). The words "any person who is aggrieved" by "the valuation list for the time being in force" import in the clearest possible terms a grievance at the time of the making of the proposal, and any other interpretation involves reading other words into the Act. The construction which the appellants contend for may involve certain anomalies, but not to the same extent as would the respondents' contention. [He referred to *Rex* v. *London, Brighton and South Coast Railway Co.* (3); *Consett Overseers* v. *Durham County Council* (4); and *Barking Rating Authority* v. *Central Electricity Board* (5).]

Frederick Grant for the respondents. By the Act of 1925 the hereditament must be assessed at the rent at which it might reasonably be expected to be let on a tenancy from year to year. The whole controversy here is as to the date at which that rent is to be determined and on that subject the Act is silent. The appellants' alternative contention (para. (*c*)) means that one must assume a tenant entering into a tenancy on April 1, 1939, and, contrary to the facts, that he knew that war was going to break out before the end of the rating year. Such a contention, based on a hypothetical tenant with second sight, cannot be accepted. To ascertain whether a person is aggrieved you have to find out whether his property was assessed at its true value at the time when the rate was made, in this case April 1, 1939. Sub-s. 7, which says that the assessment committee are to hear and determine a proposal as if it were an objection to a draft list, indicates that the proposal is to be determined by fixing the value of the property as at the date when the list is to become effective—April 1. If, under sub-s. 10, an amendment of the list is to operate as from the beginning of the period in respect of which the current rate was made, that gives rise at least prima facie to a presumption that the amended assessment shall be on the value at that date. Any alteration made on a proposal does not take effect until the new rate is made, and any other construction of the statute must lead to anomalies. A person, for instance, might make a proposal on March 24, and war might break out on March 30. It could not be right to say that the amount of his liability for rates during practically the whole of the preceding twelve months must be based on the assumption that it was a year of war, when in fact it was not. It is much less anomalous to say that there is a slight time lag before the effect of an amendment has practical results. Under the law which prevailed before 1925, whenever property had to be valued for the purpose of making or amending the valuation list the value had to be fixed with reference to the first effective date, namely, that of the levying of the first rate on the amended list. That being the undisputed position under the old law, it ought not to be supposed, unless it is clearly indicated by the statute, that the Act of 1925 has altered the law, for the Act of 1925 is primarily procedural. [He referred to the observations of Goddard L.J. in *Barking Rating Authority* v. *Central Electricity Board* (1).]

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(1) [1938] A. C. 321.
(2) [1939] 2 K. B. 640.
(3) (1851) 15 Q. B. 313.
(4) (1922) 128 L. T. 310.
(5) [1940] 2 K. B. 493.

Cur. adv. vult.

1941. May 8. The judgment of the Court (HUMPHREYS, SINGLETON and TUCKER JJ.) was read by SINGLETON J. as

(1) [1940] 2 K. B. 493, 497.

follows, after stating the facts. The question must be determined by reference to s. 37 of the Rating and Valuation Act, 1925. Certain old authorities were cited to us, but it is to be remembered that the Act of 1925 established a new code of procedure in an effort to simplify the law and that it is to the Act itself that one must now look. Sect. 37 of the Act deals with the revision or amendment of current valuation lists, and sub-s. 1 provides that any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force may make a proposal for the amendment of the list. If the person who is aggrieved is the occupier or ratepayer, his grievance is probably that his assessment is too high. It may be too high because the figure originally inserted in the valuation list was too high and he did not lodge an objection under s. 26, or it may be too high because of some change in the circumstances since the approval of the valuation list under s. 28. In either case, the occupier is a person aggrieved. It is for him to show incorrectness or unfairness, and, if he does so, he is prima facie entitled to relief.

It was argued on behalf of the assessment committee that a person was not to be considered as "aggrieved" within s. 37, sub-s. 1, unless his grievance existed on April 1, immediately preceding the date of the proposal. Clearly, there is nothing in sub-s. 1 itself lending support to such an argument. So far as the sub-section goes, all that the person making a proposal has to show is that he is aggrieved by the incorrectness, etc. Sub-s. 7 of s. 37 was called in aid, and it was said that the provision that the assessment committee were to hear and determine a proposal as if it were an objection to a draft list indicated that it was to be dealt with as though it were made at the commencement of the rating year—on April 1—but, if there were anything in that argument, it would take one back, not to the commencement of the year, but to the commencement of the current valuation list, which might be three or four years earlier. In our view, sub-s. 7 only provides procedure and nothing more.

Then reliance was placed on sub-s. 10 of s. 37, which provides in general that an amendment made in the valuation list under the provisions of s. 37, sub-s. 1, shall be deemed to have effect as from the commencement of the period in respect of which the rate was made, that is, normally, from April 1 immediately preceding the proposal. The proviso to the sub-section makes an exception in the case of a newly-erected hereditament, or a hereditament which has been structurally altered, and in such cases the amendment in the list is to take effect from the date when the newly-erected hereditament comes into occupation, or as from the happening of the event giving rise to the alteration in value. It is to be observed that in the cases covered by the proviso there is a definite date on which it can be said that the alteration in value takes place. In other cases there is no such definite date and the legislature had to provide what should be done. The simple thing is to take the beginning or the end of the period in respect of which the rate was made. Either might have been taken. Sub-s. 10, apart from the proviso, fixed the date as from the commencement of the period. It is said that this results in an anomaly, and yet, if it is examined, it will be seen to lead to as equitable a result as would appear possible. A change in the value of a hereditament which is not due to structural alterations and the like, but which is due to a change of circumstances, usually takes place somewhat gradually, and a proposal for the amendment of the list is seldom, if ever, lodged on the day the changed circumstances commence to operate. The making of a new road may change the value of a public house, so may the demolition of property near the site, so may the building and occupation of new property, and so may the incidence of war, leading perhaps to the closing of certain routes. In many of such cases the change is not seen or appreciated at once, and the change has been going on for some time before a proposal is made. For that reason, if for no other, the altered value should be dated back rather than forward, and in this connection it is most important to remember that proposals under s. 37 can be made by the rating authority and by the county valuation committee as well as by the ratepayer. It is not a onesided arrangement. One of the objects of the Act was to promote uniformity, and this is but an illustration of that.

In our view, sub-s. 10 does not help towards the construction of sub-s. 1, which is clear of itself. The person making the proposal must satisfy the assessment committee that he is aggrieved. He may be aggrieved by the fact that the value so stated in the valuation list has been too high since the commencement, or he may be aggrieved by the fact that on the date of his proposal his assessment is too high. Equally, the rating authority would be aggrieved within the sub-section if they showed that the original figure was too low, or that it had for one reason or another become too low. It is interesting to see that this was the view expressed by Judge Konstam in "The Modern Law of Rating," published in 1927, shortly after the passing of the 1925 Act, c. XIV., pp. 246 and 247. I will read two extracts. "A proposal "may be made whether the correction desired is one which "ought to have been made when the list itself was first made, or "whether it is due to a change of circumstances that has taken "place since that time" ; and again a little later : "The right "of proposal is therefore equally wide with the right of objection, "and is open to the same persons and authorities. There are "no limiting words ; and any point in which a valuation list fails "to represent, or has ceased to represent, fairly and correctly "the values and other particulars that it ought to contain, can "be set right by means of a proposal." We see nothing to support the argument on behalf of the assessment committee that there can be no amendment or alteration of the figures unless the alteration in value had taken place by or before April 1. So to construe sub-s. 1 would be introducing limiting words which are not to be found in the section.

Barking Rating Authority v. *Central Electricity Board* (1) was cited to us as showing that Goddard L.J., in giving the judgment of the Court of Appeal, said that the accounts of the board up to April 1, 1934, were relevant, and those subsequent to that date were irrelevant. That decision gives no help on the point before us. The Court in that case decided

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(1) [1940] 2 K. B. 493, 495, 497.

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that the profits basis was the proper mode of assessment in the absence of any special circumstances, and that the profits basis must be calculated on the profits ascertained down to the latest period before the date of the rate or the making of the valuation list. It is clear from the judgment that the dispute between the parties was as to the value of the hereditament on April 1, 1934, and no point arose such as that which we have to decide.

The proposal in the present case was made by the rating authority who thereby put forward the view that the figures should be increased. The occupier and the owners of the hereditament gave notice of objection, rather in the nature of a set-off. It was then the duty of the assessment committee to consider the case and to weigh all the relevant matters. One was the increase that ought to be made because of the decision in *Robinson Bros. (Brewers), Ld.* v. *Durham County Assessment Committee* (1), but there was also the fact that the hereditament, in view of its situation, was affected adversely by the outbreak of war. On consideration of these and all other relevant matters it was for the assessment committee to determine what rent a hypothetical tenant would pay on January 24, 1940, the date of the proposal, for a yearly letting.

The answer to the question asked in the case is that, in our judgment, the contention of the appellants, to be found in para. (*b*), is correct. The appeal is allowed.

Appeal allowed.

Solicitors for appellants: *Godden, Holme & Ward.*

Solicitors for respondents: *Watkins, Pulleyn & Ellison, for H. H. Brown, Town Clerk, Gravesend.*

A. W. G.

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(1) [1938] A. C. 321.

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May 14.

MINISTER OF AGRICULTURE AND FISHERIES *v.* PRICE.

Emergency legislation — Agriculture — Direction by War Agricultural Executive Committee—Failure to comply—Duty of justices—Reasonableness of direction—Defence (General) Regulations, 1939, *regs.* 62, 66, 92.

On an information against P. for failure to comply with a direction given by a County War Agricultural Executive Committee under reg. 62 of the Defence (General) Regulations, 1939, the giving of the direction and the failure to comply with it were proved :—

Held, that the justices were bound in law to find that an offence had been committed, and were not entitled to inquire into the reasonableness of the direction.

CASE stated by Herefordshire Justices.

An information was preferred by the appellant, the Minister of Agriculture and Fisheries, under reg. 92 of the Defence (General) Regulations, 1939, against the respondent, Richard Ernest Price, for that he, on August 1, 1940, failed to comply with a direction made on July 24, 1940, under reg. 62 of the Defence (General) Regulations, 1939 (1), directing him to carry out certain works of cultivation in respect of two fields in his occupation at Manor Farm in the Parish of Staunton-on-Arrow, in the County of Hereford, Nos. 35 and 41 on the Ordnance Survey map, contrary to reg. 92 of those Regulations. The justices dismissed the information.

(1) The Defence (General) Regulations, 1939, reg. 62, art. 1: "The Minister of Agriculture and "Fisheries may give such directions with respect to the cultivation, management or use of "agricultural land as he thinks "necessary or expedient for the "purpose of increasing or maintaining the production in the "United Kingdom of articles "essential to the life of the "community . . . ."

Reg. 66: "The Minister of "Agriculture and Fisheries may "by order provide for delegating, "to such extent and subject to "such restrictions as may be "specified in the order, to any "person or body of persons "appointed or approved by him "all or any of his functions under ". . . . Regulation 62 . . . ."

[By the Cultivation of Lands Order, 1939 (St. R. & O. 1939, No. 1078), the Minister delegated his powers under reg. 62 to War Agricultural Executive Committees.]

Reg. 92, art. 1: "If any person "contravenes or fails to comply "with . . . . any direction given ". . . . under any of these "regulations . . . . he shall be "guilty of an offence against that "regulation."

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The following facts were proved or admitted: The respondent, who lived at Ludlow, in the County of Salop, was the tenant of Manor Farm, which was a farm of 151 acres, which included fields numbered 35 and 41 on the Ordnance Survey map.

By a direction dated July 24, 1940, the County of Hereford War Agricultural Executive Committee directed that field No. 35 should "be cultivated, cleaned and sown with a catch "crop not later than July 31, 1940" and on field No. 41 "the "docks to be cut, gathered, burned or otherwise destroyed "not later than July 31, 1940." This direction was duly received by the respondent, who did not comply with it.

For the appellant it was contended that: (*a*) on proof that the direction of July 24, 1940, had been served on the respondent, and that he had failed to comply with it, the Court was bound in law to convict the respondent; (*b*) that the reasonableness of the direction could not be questioned by the Court; (*c*) that notwithstanding the view taken by the Court that the direction was unreasonable, the Court was bound in law to convict the respondent.

For the respondent it was contended (*a*) that the direction was unreasonable; (*b*) that the Court was entitled to inquire into the reasonableness of the direction; and (*c*) that if the Court took the view that the direction was unreasonable, the Court was bound, or alternatively entitled, to dismiss the information.

The justices, being of opinion that the direction was unreasonable, held that the information should be dismissed, and their decision was announced by the Chairman in the following terms:

"We have listened with very great care to what the experts "have said, and we duly appreciate that they are experts, but "we have come to the conclusion that we rather differ from the "experts. I am sorry to say so. In this case we think it was "not reasonable to ask the defendant to plough up and plant "that particular land. Several of us here are acquainted with "the land, which, perhaps, is fortunate for Mr. Price. We "think that the proper course would have been to cultivate,

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"clean, apply three ton of lime, and to summer fallow that "land. We think that when he is asked to plough or sow the "land he is being asked to do something which is unreasonable. "It is useless to plant land and sow it where the land will not "give a return. The important thing is to get the land into "proper heart, and then to hope for your crop. Mr. Price, I "think, had only been there for two years; he has not had "time to get the land into order. He was leaving. You cannot "expect a man who is leaving to sow a crop when he knows "there will be no return. The best he can do is to do his best "to see that the land may be in some way prepared for the "incoming tenant, so we have decided to dismiss the charge."

The question for the Court was whether the justices came to a correct decision in law.

Sir Donald Somervell A.-G. and *Diplock* for the appellant.

There was no appearance on behalf of the respondent.

VISCOUNT CALDECOTE C.J. This is a case stated by justices who have dismissed a charge of non-compliance with a direction given by a War Agricultural Executive Committee under powers delegated to them by the Minister of Agriculture and Fisheries. [His Lordship summarized the relevant regulations.] The respondent failed to comply with the directions of the Committee, and that fact being found by the Special Case, the question arises whether an offence has been committed. The justices took the view that the direction was not the right direction. They based their decision to dismiss the charge upon the opinion which they held, in that respect differing from those whom they called "the experts," "the "experts" being the witnesses who were called for the Committee to prove the notice, the service of it, and so on.

In my judgment, the only question which the justices ought to have considered was, not the reasonableness of the view held by the Committee, but whether the giving of the direction and the failure of the respondent to comply with it were proved. Both those things were proved, and in my opinion an offence was committed. The proper order is that the case should be remitted to the justices with an expression of the opinion of the Court that an offence has been committed.

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HUMPHREYS J. I agree.

SINGLETON J. I agree.

Appeal allowed.
Case remitted to justices.

Solicitor for appellant: *Official Solicitor to the Ministry of Agriculture and Fisheries.*

J. W. H.

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June 12, 13.

FOX *v.* NEWCASTLE-UPON-TYNE CORPORATION.

Emergency legislation—Air-raid shelter erected on highway—Erection after Lighting (Restrictions) Order, 1939, *in force—Accident—Collision of bicyclist with shelter—Shelter unlighted and not painted white—No negligence—Civil Defence Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 31), *s.* 9*—Lighting (Restrictions) Order,* 1939 (*St. R. & O.*, 1939, *No.* 1098), *paras.* 1, 4.

After the coming into force of the Lighting (Restrictions) Order, 1939, a corporation in exercise of the power conferred by s. 9 of the Civil Defence Act, 1939, erected a public air-raid shelter on a city highway. On the evening of the day on which its erection was finished a bicyclist ran into the shelter during the black-out period, the shelter having been left without any light and without being painted white. The bicyclist brought proceedings to recover damages:—

Held, by the Court of Appeal (MacKinnon and Luxmoore L.JJ., du Parcq L.J. dissenting) that the corporation were under no duty either at statute or under the common law to keep the air-raid shelter lighted or painted white.

Greenwood v. *Central Service Co.* [1940] 2 K. B. 447; *Wodehouse* v. *Levy* [1940] 2 K. B. 561; and *Lyus* v. *Stepney Borough Council* [1941] 1 K. B. 134 followed.

APPEAL from His Honour Judge Richardson sitting at Newcastle-upon-Tyne County Court.

On September 26, 1940, the plaintiff, Harold Fox, while riding a bicycle at about 9.15 P.M., during the black-out, ran into an air-raid shelter which had just been erected by the Newcastle-upon-Tyne Corporation in the roadway of Westwood Avenue, Heaton, Newcastle-upon-Tyne, under the authority conferred by s. 9, sub-s. 1, of the Civil Defence Act, 1939. The plaintiff sustained injuries to his cycle, clothing and person, and on December 30, 1940, commenced proceedings in the county court claiming 21*l.* 16*s.* damages on the ground that the accident was caused by the neglect of the corporation in failing to light the shelter or paint it white. By their defence the corporation denied that they had been guilty of any negligence and took the objection that the action was not maintainable as there had been no duty on them which they had failed to discharge. At the hearing the plaintiff gave evidence that he turned into Westwood Avenue close to where the shelter was placed,

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that it was the first time that he had been in this road since the erection of the shelter had been commenced, and that it was very dark so that, although he had the proper lighting on his bicycle, he only saw the shelter too late to avoid it. The evidence for the corporation was that the erection of the shelter was completed on the day of the accident. It could not then be painted owing to the wet, but it was painted white on September 29.

The county court judge held that while *Greenwood* v. *Central Service Co.* (1) *Wodehouse* v. *Levy* (2) and *Lyus* v. *Stepney Borough Council* (3), following *Great Central Railway Co.* v. *Hewlett* (4), made it clear that no duty or obligation was thrown upon the corporation to light the shelter either under statute or at common law, the fact that the shelter could not at once be painted white owing to bad weather made it not only proper and advisable but essential that the power to light obstructions in the highway given by the Lighting (Restrictions) Order, 1939, should be exercised, especially as the shelter had been erected in a street of some importance. He therefore gave judgment for the plaintiff for the amount claimed.

The corporation appealed.

Montague Berryman for the corporation. The decision of the county court judge is contrary to the decisions of this court in *Greenwood* v. *Central Service Co.* (1); *Wodehouse* v. *Levy* (2); and *Lyus* v. *Stepney Borough Council* (3). These cases show that when a local authority is given power to erect an obstruction on the highway, the authority is under no statutory or common law liability for not keeping it lighted in view of para. 1 of the Lighting (Restrictions) Order, 1939, which suspended the previously existing obligation of the local authority to keep streets lighted. The county court judge recognized this and yet held in view of the permission given by para. 4 of the order to light obstructions in the highway, that the defendants were negligent in not making use of that

(1) [1940] 2 K. B. 447.
(2) [1940] 2 K. B. 561.
(3) [1941] 1 K. B. 134.
(4) [1916] 2 A. C. 511.

permissive power. The Civil Defence Act, 1939, s. 9, gives local authorities power to erect air-raid shelters on highways, but imposes no duty to light them.

J. G. Kekwick for the plaintiff. The county court judge was right in holding that the defendants had been guilty of negligence in not lighting the shelter, seeing that it was not possible to paint it white till three days later.

[du Parcq L.J. In all of the three cases *Greenwood* v. *Central Service Co.* (1), *Wodehouse* v. *Levy* (2) and *Lyus* v. *Stepney Borough Council* (3), the Court was dealing with obstructions on the highway placed there before the Lighting (Restrictions) Order, 1939, came into force. Is there any case dealing with an obstruction erected since the black-out ?]

No, this is the first case in which such an erection is in question.

[du Parcq L.J. May it not be that where black-out provisions are already in existence when a building is erected on the highway it must be erected so as to be as safe as possible ? See the observations of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (4), and Salmond on Torts, 9th ed., p. 48.]

That is so. The *Bann* case (4) was very similar to the present one, for there was in that case a permissive power to lead water to a reservoir, and yet when this resulted in flooding the proprietors were liable.

[Luxmoore L.J. There the work of leading down the water was done negligently.]

The same principle applies. The fact that the local authorities have been given statutory authority to erect air-raid shelters on the highway does not relieve them of the obligation to do it so as to avoid causing damage to users of the highway so far as possible. They will only be relieved of liability if the damage could not be avoided.

[Luxmoore L.J. referred to *Great Central Railway Co.* v. *Hewlett* (5).] By deciding against the plaintiff in this case,

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(1) [1940] 2 K. B. 447.
(2) [1940] 2 K. B. 561.
(3) [1941] 1 K. B. 134.
(4) (1878) 3 App. Cas. 430.
(5) [1916] 2 A. C. 511.

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the court would be extending the law. It cannot be right to treat the power given to local authorities to erect shelters in highways as entitling them to do so without taking any reasonable precaution to protect users of the highway. The mere fact that statutory authority is given to a local authority to do an act cannot relieve the authority from liability for an accident that could have been prevented by the exercise of reasonable care. It would be taking too narrow a view to regard the local authority as only liable when the construction authorized is faultily erected.

Berryman in reply referred to *Baldock* v. *Westminster City Council* (1).

MacKinnon L.J. [stated the facts, and proceeded :] Those being the facts, the learned county court judge gave judgment, in which he referred to certain cases which had been decided by this court, and he did so in these terms : "It is quite "clear from the cases of *Greenwood* (2), *Levy* (3) and *Lyus* (4), "following the case of *Great Central Railway Co.* v. *Hewlett* (5), "that there was no duty or obligation thrown upon the corporation to light the shelter in question in this case either "under statute or at common law." I think that that was a correct interpretation of those cases and if there were no obligation thrown on the corporation, either under statute or at common law, to light the shelter it would seem to follow that there ought to be judgment for the defendants. But the learned county court judge goes on in these terms : "but "the fact that they have permission to display lights in certain "circumstances would seem to leave open the question whether "in the special circumstances of this case reasonable care was "taken under the ordinary law of negligence." As a matter of expression I do not understand the whole of that sentence, because, if there was no duty either under statute or at common law, it is difficult to see how under the second part of that assertion there is left open the question whether they had failed to use reasonable care under the ordinary law of negligence which must be part of the common law. For my part, as to those cases of *Greenwood* (1), *Levy* (2) and *Lyus* (3), to which I was a party, I must accept them, and I think they were rightly decided. If there was any error in them it must be corrected by a superior tribunal. I think, therefore, that the plaintiff's case fails. The only possible distinction between the facts in those cases and in the present case is this: in those cases the particular obstructions—a sandbin in one case and a bollard in the centre of the road in the other two cases—had been erected pursuant to statutory powers before the date at which the obligation of the local authority to light the streets had been abrogated by the lighting order, whereas in this case the shelter had been erected after that obligation had been abrogated. I cannot think that that distinction can make any difference and if it were so it would have startling consequences. When the borough surveyor or engineer concerned with the business part of the corporation in regard to streets consulted the town clerk as to his legal liability, the town clerk would have to go along the streets with him and say "you are under no obligation to light those "bollards in the centre of the road, the trees planted along "the side of the street, the sandbins, the pillar boxes, or that "hideous statue of the Victorian mayor in the centre of the "road, because all these were erected before we were forbidden "to light the streets; but if there is any post or structure in "the roads which you have erected since then, you must be "very careful to put a light upon it." It does not follow that a rule of law is wrong because it sometimes results in absurdities, but the matters I have referred to do illustrate the way the matter strikes me. If the cases of *Greenwood* (4), *Levy* (5) and *Lyus* (3), were rightly decided, as I think they were, I cannot think that the fact that this particular obstruction was erected in the highway after the obligation to light the streets had ceased can or ought to make any difference in regard to the corporation's duties. I think that this appeal should be allowed and judgment entered for the defendants with costs.

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(1) (1918) 120 L. T. 470.
(2) [1940] 2 K. B. 447.
(3) [1940] 2 K. B. 561.
(4) [1941] 1 K. B. 134.
(5) [1916] 2 A. C. 511.

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(1) [1940] 2 K. B. 447.
(2) [1940] 2 K. B. 561.
(3) [1941] 1 K. B. 134.
(4) [1940] 2 K. B. 447, 453.
(5) [1940] 2 K. B. 561, 568.

Luxmoore L.J. I agree that this appeal should be allowed. The case before the county court judge was argued on the footing that the air-raid shelter, with which the plaintiff came into contact, was erected in accordance with the statutory provisions that authorized its erection and was, therefore, not an unlawful obstruction or a nuisance at common law. On this basis the case would appear to me to be covered by the recent decisions to which my brother MacKinnon has referred. The learned county court judge appears to have recognized this, for he said in his judgment that it was quite clear from those cases, following the case of the *Great Central Railway Co.* v. *Hewlett* (1), "that there was no duty or obligation thrown upon the corporation to light the shelter in question in this case either under statute or at common law." If that is correct it seems to me that the only logical result is the dismissal of the action. But the county court judge went on to say that, although there was no statutory or common law obligation, it would be a reasonable thing for the shelter to be distinguished either by a lamp or by white paint; and that the defendants must be held liable, as they had powers to use a lamp of a limited capacity and to whiten either the whole or part of the shelter and did not take advantage of either of those powers. That seems to me to be a strange result if there is no statutory or common law obligation to light or paint. In this court it was sought to justify the decision on the ground that the statutory requirements had not been fulfilled. It was said that the shelter constituted a nuisance because it was erected at a time when the Lighting (Restrictions) Order, 1939, was in force, and consequently not erected in accordance with statutory requirements because the existence of the restriction made it, I suppose, imperative to provide a light of the permitted nature, or to build the shelter of suitable materials to render it more

(1) [1916] 2 A. C. 511.

visible at night time, or to paint it, or part of it, white. In view of the admission made in the court below that the shelter was in accordance with the statutory requirements it seems to me that this point is not open to the respondent in this court; but even assuming that the point is open to him I feel that I cannot spell out any such requirement from the Civil Defence Act, 1939, which, by s. 9, authorized the erection of the shelter in question. The Act received the Royal Assent on July 13, 1939; it was passed before the war broke out and obviously in contemplation of war; yet there is no qualification in regard to the manner in which, or the materials of which, the air-raid shelter is to be constructed; nor is there any provision with regard to the necessity for lighting any such shelter during times when lighting restrictions may be in force, although I find in s. 13 of that Act a direction with regard to the issue by the Minister of a code prescribing requirements with which a shelter must comply. Further, the provision of a light after the shelter has been erected is not, I think, in any way connected with the process of erection, and I cannot appreciate how it can be said that the failure to provide a light after the shelter has been erected can affect the question whether the shelter has been properly erected or not. In my judgment, there is no substantial ground on which to distinguish this case from the decisions to which reference has already been made.

I am, therefore, of opinion that the county court judge ought to have dismissed the action, and I agree with my brother MacKinnon that this appeal should be allowed with costs.

du Parcq L.J. I have the misfortune to differ from the other members of the court. I feel much impressed by their unanimous decision, especially as they have had the opportunity on a previous occasion—which I have not had—of giving very careful consideration to cases superficially, at any rate, resembling this one. But for the doubt and the diffidence which are naturally created in my mind by this impressive unanimity, I am bound to confess that I should have thought this a reasonably plain case and, taking the view which I do of authorities binding upon this court, I should have thought that we could take no other course than to affirm the decision of the learned county court judge.

The facts are simple enough. [His Lordship stated them, and proceeded:] The question then arises whether that obstruction on the highway can be justified, and the answer of the defendant authority is that it is justified because by s. 9 of the Civil Defence Act, 1939, they were permitted—it is of some little importance that the authority was permissive—to provide a public air-raid shelter on any highway and for that purpose to construct works and affix appliances. It may be that in parts of his judgment the learned judge's language is not altogether felicitous, but there is one passage in the judgment which seems to me to be conclusive of the matter, it not being in doubt that there was evidence to support his findings of fact. He says: "In the case which I have to "consider, the shelter had, for the reasonable safety of the "public, to be painted when completed; it had been com-"pleted; it had not been painted owing to the bad weather, "and this seems to me to be an occasion when any reasonable "official of the corporation in charge of the erection would "have thought it, not only proper and advisable, but essential, "that the power to light allowed under the Lighting (Restric-"tions) Order should be exercised, especially as this obstruction "had been erected in a street of some importance." He finds, further, that if there had been such a light the accident would not have happened. Now the question is whether on those findings of fact the plaintiff is entitled to recover. In this case, as in many other cases, reference has been made to what was said by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1). We know that that statement of the law has sometimes been misunderstood, but I think that in this case it is applicable to the facts. It is interesting to see that as long ago as 1878 Lord Blackburn in the House of Lords thought it unnecessary to go through all the cases and contented himself with summarizing them. I read only one short passage from his speech: "I think that if by a reasonable exercise of "powers, either given by statute to the promoters, or which

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(1) 3 App. Cas. 430.

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"they have at common law, the damage could be prevented, "it is, within this rule, negligence not to make such reasonable "exercise of their powers." Statutory authority may be given in general terms, as here, "to provide a public air-raid "shelter": sometimes Parliament may authorize a particular building, but here the authority is given in general terms. It does not follow because it is given in general terms and no specific directions are given, that therefore the body entrusted with the work can build anything which comes within the general description in the Act. Parliament need not go into detail and often does not go into detail. It is put in this way in Salmond on Torts, 9th ed., p. 49: "Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or "other injurious consequence. Conditional authority is "authority to do the act provided it can be done without "causing a nuisance or other injurious consequence. This "condition is sometimes expressed, but is more often left to "be implied from the general provisions of the statute." Then there is a reference to the very well known case of *Metropolitan Asylum District* v. *Hill* (1), which contains some very valuable observations, particularly in the speech of Lord Watson, to which I think it unnecessary to refer in detail now. I think in the present case it is an implied condition of the authority to build public air-raid shelters on the highway, that they must be so built that they will cause as little obstruction as possible to the highway. There is another class of cases where a precise thing is authorized; and the distinction is brought out very clearly in the *Metropolitan Asylum District* case (1) to which I have just referred. In such a case after the matter has been investigated by a Parliamentary Committee which has seen the plans, details and drawings of a building, Parliament may authorize the promoters to build that very building; it may be the most dangerous building in the world, but if Parliament has said it may be built in that form, then this may be done, and nobody can maintain an action in respect of damage caused by the danger. My own

(1) (1881) 6 App. Cas. 193.

view of *Great Central Railway Co.* v. *Hewlett* (1) in the House of Lords is that it is really an illustration of the principle stated in those cases which say that where the precise building is authorized no complaint may be made of the building erected. *Hewlett's* case (1) was a curious case so far as the facts were concerned. Something existed which was a nuisance to the highway, and all that Parliament did was to say, knowing that this nuisance existed and had existed for some years before 1901, when it was judicially held to be an obstruction on the highway, "The company may maintain the posts and "gates which constitute an obstruction and replace them when "necessary." In other words, the court having said, "Here "is an obstruction on the highway which is a nuisance," Parliament said, "Never mind; it may be an obstruction "but you may maintain it; you need not alter it; you need "not light it; you need not do anything; you may maintain "it." When it was argued in that case that the general principle applied, the answer was that *Hewlett's* case (1) was not within that general principle at all. I should like to read a few words from what was said by Lord Sumner (2) "The "analogy which led the Court of Appeal to decide for the "respondent was that of *Rex* v. *Pease* (3), *Vaughan* v. *Taff* "*Vale Railway Co.* (4) and *Geddis* v. *Proprietors of Bann* "*Reservoir* (5). With great respect, I think it was inapplicable "on two grounds. In the first place, those are cases where "the legislature had authorized undertakers to do overt acts "which in the natural course of things were likely to prejudice "members of the public. The present is a case in which, "without any action at all, the respondents were authorized "to leave something undone, namely, the abatement of what "previously had been a nuisance. They were merely to "maintain a status quo, the natural results of which could "not prejudice anybody, for if the place was lighted, no one "ought to run into the post at all, since he could see it, and if, "owing to fog for example, the place was in darkness, no one

(1) [1916] 2 A. C. 511.
(2) Ibid. 523.
(3) (1832) 4 B. & Ad. 30.
(4) (1860) 5 H. & N. 679.
(5) 3 App. Cas. 430.

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"ought to be injured by the post, since he had no business "to drive so fast as to be damaged if he did run into it. In "the second place, in such cases the authority in question is "given in general terms; it is, for example, authority to work "railways and to run railway trains in the undertakers' "discretion; hence it is reasonable to infer that the legis-"lature, in using such general terms, and in authorizing for the "undertakers' benefit what would otherwise be a nuisance, "meant them to exercise their authority with reasonable "care, and not without it." It is plain that the present case is one where the legislature has authorized undertakers to do overt acts which in the natural course of things—I would add the words "unless reasonable care is taken"—are likely to prejudice members of the public. It is not as if Parliament had said: "You have put up something which is an obstruc-"tion to the highway; you may maintain it." Parliament is saying: "You may construct a public air-raid shelter"; it is saying it in general terms and it is, as it seems to me, reasonable to infer that the legislature meant the undertakers to exercise their authority with reasonable care.

The other rule of law with which I must deal is that established by the cases recently decided in this court which are binding on us. I am referring to *Lyus* v. *Stepney Borough Council* (1) and the two other cases mentioned by MacKinnon L.J. I understand those cases to decide that when the question arises whether statutory powers have been exercised reasonably, regard must be had to the date at which they were exercised. If, for instance, authority was given to erect sandbins at a time when the conditions to which we were accustomed before the war prevailed, and sandbins then were erected which were reasonably safe in those conditions, no new statutory or common law duty is imposed on the responsible undertakers by reason of the change in those conditions: having put up sandbins in 1938 which then were perfectly safe from the point of view of the public, they did not come under a new duty when what are called the black-out regulations came

(1) [1941] 1 K. B. 134, 146.

into force. That seems to me to be made perfectly clear by a few words from the judgment of Luxmoore L.J. in *Lyus's* case (1): "In our judgment, the question whether the "erection of the sand bin will hinder the reasonable user of "the street by the public or any other person is one to be "considered at the time when the sand bin was erected, and "if at that time there was no such hindrance it is difficult "to see how at some later date it can be said that the sand-"bin has become a hindrance to the user of the street." In each of the cases which are said to be binding here one finds that the obstruction had been put up with every care, or at all events, with all reasonable care, in the conditions prevailing at the time of its erection. They do not seem to me to touch what I conceive to be the question in this case. Everybody knows what a public air-raid shelter is and what its purpose is. It is not, as we all hope, a permanent erection. I do not suppose it is intended that air-raid shelters should continue to exist on the highways when air raids have ceased. The local authorities are told that they may build shelters to provide against air raids and when the air raids are made at night there will be darkness in the ordinary course of things. I cannot think it wrong to say that Parliament must have intended, when it authorized the erection of "an air-raid shelter" on a highway, that a building should be erected which could safely be used as an air-raid shelter and which would not cause any unnecessary danger to the King's subjects when they were using the highway. I emphasize the word "unnecessary" because it may be that in the prevailing circumstances there must be some danger to people using the highway from an obstruction which cannot be very well lighted. If an air-raid shelter was so constructed that it was badly ventilated and caused the asphyxiation of a large number of people using it, nobody would say that its construction could be justified by the Act. Nobody would say if the architect thought it desirable to put ornamental spikes round it or to make some other addition to its architectural features which was dangerous to people using the highway, that because it could

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be called an air-raid shelter its construction in that form was authorized. I cannot see why regard should be had only to the people inside the shelter and not to those using the highway outside the shelter, and indeed I do not think that this would be suggested. Therefore it seems to me that the learned judge takes a perfectly reasonable view when he says that if a shelter is being constructed on a highway, which must go on existing during a time when there will be no light, so that the more visible it is the less dangerous it will be, it is a mere matter of reasonable common sense (so that Parliament need not say it in express terms) that it must be made as visible as possible. Indeed, it is to be noted in this case that the corporation took the view, as one would expect, that it ought to be made as visible as possible and were proposing to paint it white. They had not painted it white because of the bad weather, but they were proposing to do so, and if it had been painted white this accident would not have happened. I cannot see that, because Parliament did not say, "You must "not make an air-raid shelter which it is impossible for a "motorist or a cyclist or perhaps even a pedestrian to see in "time to avoid running into it," it is open to a local authority to make an air-raid shelter which nobody could be expected to see at all. That does not seem to me to be a reasonable interpretation of the statute, and, with respect, it seems to me to be unsound as a matter of general legal principle.

In those circumstances I do not think it matters whether one regards this as a completed structure or as an uncompleted structure. If it be regarded as a completed structure (and so far as mere structure is concerned it was completed) then the local authority had built and put on the road something which they could have made a great deal safer than it was by the exercise of reasonable care; and, as they had failed to exercise that reasonable care and had put upon the highway an obstruction which was more dangerous than it need have been, its erection was not, in my view, justified or authorized by the Act of Parliament. The alternative view is that the shelter was not yet completed at the time of the accident. That, I think, is what the learned judge in substance has found, although he says that it was complete. I am not criticising him about that because it is a mere matter of words and a very unimportant matter; but we were told by Mr. Berryman, appearing for the local authority, that this unfortunate accident happened in an intermediate period when there had not yet been time for local authorities generally to take all the steps which they would have wished to take. Let me deal with it on that footing for a moment. Here is a building which the local authority knew would not be safe until they had painted it white, and they intended to paint it white. In that sense one may say it was not a completed structure. Supposing that in the course of building it they had left a heap of stones on the road; nobody doubts for a moment that, if somebody had been injured by falling over that heap of stones, an action could have been brought against them because they were not exercising their undoubted statutory powers with reasonable care. The position is the same if the excuse here is: "We are very sorry; we had not quite finished; if you had "given us another week or two it would have been painted but we "had not quite finished the work." I find it quite impossible to distinguish as a matter of principle between the leaving on the road of a heap of stones or other obstruction in the course of doing the work and the leaving on the highway of the building unfinished in the sense that it has not been painted in order to make it safe. I think in principle the two cases are the same. I would quote, if I may, a few lines from the judgment of Vaughan Williams L.J. in the well known case of *Penny* v. *Wimbledon Urban Council* (1): "In cases like the present, "where a statutory authority has power to do something to a "road which involves stopping it, or to do something to it "which will make it dangerous while it is being done, there "is a duty cast upon them to take care that the Queen's "subjects are not injured by any carelessness in the doing of "that which has to be done." When a building is being erected which will not be safe until it is painted white or in some other way made visible, I think that it is carelessness—or at any rate a judge is fully entitled to find that it

(1) [1899] 2 Q. B. 72, 77.

is carelessness—to leave it during that period of transition, when it has not yet been rendered safe, without such protection to the public as the provision of a light would give. Here the corporation could have provided a light. It is quite true that circumstances may arise when they will not be able to provide a light; I am not concerned with that. They could have provided a light and they did not. For myself I entirely agree with the learned county court judge that in not doing so they were guilty of negligence and that there is nothing whatever in the statute to absolve them. I should not myself have been alarmed by the consequences which my Lord has pointed out might follow, that the town clerk and the surveyor would be in a difficulty because they might have to light some obstructions and not others. The point I am endeavouring to make is that you must look at the date when the building is constructed. If when the building is being constructed or has just been constructed, it is found that in the then existing circumstances there has been some failure to do what any reasonable person would have known he ought to do, then in my view the undertakers can be held liable; and I cannot see that this places any greater burden upon a local authority than the burden of showing reasonable intelligence, which I am sure is not more than one ought to be entitled to demand from them.

For these reasons and notwithstanding the hesitation which I genuinely feel because of the difference of view between myself and the majority of the court, I am quite clearly of opinion that this appeal ought to be dismissed. But the result, of course, having regard to the judgments which have been delivered, is that it must be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Collyer, Bristow & Co., for John Atkinson, Town Clerk, Newcastle-upon-Tyne; Ward, Bowie & Co., for Hodnett, Parkin & Barker, Newcastle-upon-Tyne.*

H. C. G.

HILDEBRAND *v.* LEWIS.

C. A.
1941
June 18.

Emergency legislation—Landlord and tenant—Sub-lease—Rent payable by sub-tenant to original lessor under Law of Distress Amendment Act, 1908—*War damage—Disclaimer of sub-lease—Whether original lessor "landlord" of sub-tenant—Rent payable in advance—Apportionment—Law of Distress Amendment Act,* 1908 (8 *Edw.* 7, *c.* 53), *s.* 6—*Landlord and Tenant* (*War Damage*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 8, *sub-ss.* 1, 2 (*a*) ; *s.* 11, *sub-s.* 1 (*b*) ; *s.* 24.

B. granted to L. a sub-lease of certain premises under which the rent was payable quarterly in advance. B., having fallen into arrear with his rent, his landlords served on L. a notice under s. 6 of the Law of Distress Amendment Act, 1908, with the result that L. became liable to pay to B.'s landlords the rent payable under the sub-lease. In September, 1940, the premises were damaged by enemy action and on October 22, L. gave to B. a notice of disclaimer of the sub-lease under s. 4 of the Landlord and Tenant (War Damage) Act, 1939. B. did not give to L. a notice to avoid disclaimer under s. 11 of that Act, but B.'s landlords purported to do so. They also began an action against L. claiming the rent due in respect of the premises for the quarter beginning on September 29, 1940. L. paid 22*l.* into Court, alleging that no rent was payable after October 22 :—

Held (1.) that B., and not his landlords, was the "landlord" of L. within s. 24 of the Landlord and Tenant (War Damage) Act, 1939, and, therefore, that the pretended notice to avoid disclaimer served on L. by B.'s landlords was not a good notice and L.'s notice of disclaimer was wholly unaffected thereby; (2.) that, there being no provision in s. 8 of the Act of 1939, dealing with apportionment of rent in the event of a notice of disclaimer being given, L. was liable to B.'s landlords for the whole of the quarter's rent payable in advance on September 29, and not merely for rent payable down to the date on which he served his notice of disclaimer on B.

APPEAL from the Mayor's and City of London Court.

The plaintiffs, Rebecca and Fanny Hildebrand, granted a lease of 4, Red Cross Street, London, to Richard Thomas Brown, who sublet part of the premises to the defendant, Joseph Lewis, the rent under the sub-lease being 302*l.* a year, payable quarterly in advance. As Brown was in arrear with his rent, a notice under s. 6 of the Law of Distress Amendment Act, 1908, was served on Lewis by the plaintiffs by which the rent payable by Lewis to Brown under the sub-lease became payable to the plaintiffs. In September, 1940, the premises were damaged by enemy action and, on October 22, a notice

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of disclaimer of the sub-lease was served, under s. 4 of the Landlord and Tenant (War Damage) Act, 1939, on Brown on behalf of Lewis. Brown did not give to Lewis any notice to avoid disclaimer under s. 11 of the Act (1), but, on November 21, the plaintiffs purported to do so, and, on December 3 they began an action against Lewis, claiming 75*l.* 10*s.* in respect of a quarter's rent payable in advance on September 29. Lewis paid 22*l.* into court, alleging that the quarter's rent was apportionable and that no rent was payable in respect of the period beginning at the date of the service of his notice of disclaimer. The judge of the Mayor's and City of London Court held that the plaintiffs' notice to avoid disclaimer was not effective and that they were entitled to recover 22*l.* only, and, as Lewis had paid that sum into court, he gave judgment for him, with costs.

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(1) By Landlord and Tenant (War Damage) Act, 1939, s. 8: “(1.) Where a notice of disclaimer is served, the following provisions of this section shall have effect, subject to any order of the court under the next following section, at the expiration of the period allowed under this Act within which notice to avoid disclaimer may be served, unless a notice to avoid disclaimer is served within that period or the notice of disclaimer is otherwise of no effect under this part of this Act. (2.) As from the date when the notice of disclaimer was served—(*a*) the lease disclaimed shall be deemed to have been surrendered; . . . .”

Sect. 11, sub-s. 1: “Where a notice to avoid disclaimer is served in respect of a notice of disclaimer, the notice of disclaimer shall be of effect and . . . . the lease to which it relates shall have effect subject to the following modifications: . . . . (*b*) Subject to the powers of the court under the next following paragraph, no rent shall be payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land is rendered fit . . . .”

Sect. 24 provides that, unless the context otherwise requires, the term “landlord in relation to a lease means the person who under the lease is, as between himself and the tenant, for the time being, entitled to the rents and profits of the demised premises payable under the lease”;

Sect. 24 also provides that the term “lease” has the same meaning as in the Landlord and Tenant Act, 1927. In s. 25 of that statute it is stated that “the expression ‘lease’ means a lease, under-lease or other tenancy, assignment operating as a lease or under-lease, or an agreement for such lease, under-lease, tenancy or assignment.”

The plaintiffs appealed. The appeal was heard on June 18, 1941.

Harold Samuels for the plaintiffs. The plaintiffs are entitled to the full sum claimed by them. The notice to avoid disclaimer was not effective, as the plaintiffs are not the landlords of Lewis within the meaning of the definition of "landlord" in s. 24 of the Landlord and Tenant (War Damage) Act, 1939 (1), they not being entitled to the "rents and profits of the "demised premises payable under the" sub-lease, but only by virtue of the notice given by them to Lewis under s. 6 of the Law of Distress Amendment Act, 1908. This case, therefore, falls within s. 8 (1), of the Act of 1939, and that section contains no provision for apportionment of rent corresponding to the provisions in ss. 10 and 11. Consequently, the rent due under the sub-lease from Lewis to Brown is not apportionable. The ordinary rule that rent payable in advance is not apportionable applies and Lewis is liable to the plaintiffs for the whole of the rent which became due before the date of the surrender: *Ellis* v. *Rowbotham* (2); *Turner* v. *Stella Bond, Ld.* (3), was a case under s. 11 (1), and, on that ground, is distinguishable.

Blanco White K.C. and *H. G. Garland* for the defendant Lewis. The plaintiffs were the "landlords" of Lewis within s. 24 of the Act of 1939 (1), and their notice to avoid disclaimer was, consequently, an effective notice.

The true interpretation of s. 8, sub-s. 2 (*a*) (1), having regard to the rest of the Act, is that the lease shall be deemed to have been surrendered on the terms set out in ss. 10 and 11, namely, that no rent is to be payable by the tenant after the date on which the notice of disclaimer has been served.

LUXMOORE L.J. delivered the judgment of the Court (MACKINNON, LUXMOORE and DU PARCQ L.JJ.), in which he stated the facts, and continued: If the notice to avoid disclaimer given to Lewis by the plaintiffs was a good notice, the provisions of s. 11 of the Landlord and Tenant (War Damage) Act, 1939 (1), apply to this case, so the first question to be determined is whether that notice was good. If it was not, then, as Brown has served no notice to avoid disclaimer, s. 8 of the Act (1) takes effect. The plaintiffs are not the immediate lessors of Lewis, but it is said that they are his landlords for the purposes of the Act of 1939, because of the definition in s. 24 (1), seeing that by reason of the notice which they had given him under the Law of Distress Amendment Act, 1908, they were the persons who were entitled for the time being to receive the rents and profits of the property. It is quite true that they were entitled to receive the rents and profits by virtue of the provisions of the Act of 1908, but they did not receive them under the sub-lease. The only person entitled to receive the rents and profits under the sub-lease was Brown, and there was no relationship of landlord and tenant between the plaintiffs and Lewis. That being so, it seems to be plain that the notice which they purported to serve on Lewis to avoid the notice of disclaimer which he had served on Brown was not a good notice to avoid disclaimer, with the result that the notice of disclaimer given by Lewis to Brown remains wholly unaffected.

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(1) See note (1), ante p. 136.

(2) [1900] 1 Q. B. 740.

(3) [1941] 1 K. B. 569.

By virtue of s. 8, sub-s. 2 (*a*), of the Act (1) the lease, in the present case, is to be deemed to have been surrendered on October 22, 1940. The sub-lease between Brown and Lewis provides that rent shall be paid by Lewis to Brown quarterly in advance, that is to say, on September 29, 1940, a quarter's rent became due under the sub-lease. Sect. 8 contains no provision with regard to what is to happen to the rent due as from the date of disclaimer or due down to the date of disclaimer. Under s. 11, if a notice to avoid disclaimer is served in respect of a notice of disclaimer, then no rent is to be payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land is rendered fit. It has been decided in *Turner* v. *Stella Bond, Ld.* (2), that, where a lease provides for the rent to be payable in advance, on the proper construction of s. 11, the rent must be apportioned so as to give effect to the provision that no rent is to be paid in respect of the period mentioned in the section. All that s. 8 provides is that the lease disclaimed shall be deemed to have been surrendered. It is well settled law that, where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and, as to rent previously due, is not affected by the surrender, but the lessor remains a special creditor for the rent which accrued before the surrender. It follows that, if rent becomes due before the date on which under s. 8, the lease is to be deemed to have been surrendered, the liability to pay that rent remains. It is also well settled that where rent is payable in advance the Apportionment Act does not apply: *Ellis* v. *Rowbotham* (1).

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(1) See note (1), ante p. 136.

(2) [1941] 1 K. B. 569.

The result seems to me to be plain. There can be no apportionment in the present case of the rent which fell due on September 29. The sub-lease is to be deemed to have been surrendered on October 22. The liability under the covenant to pay the rent remains; the right of Brown, the original covenantee, to enforce and receive that payment has been transferred to and vested in the plaintiffs by reason of the notice under the Law of Distress Amendment Act, 1908: consequently, the plaintiffs are entitled to recover the whole of that rent and to give a good discharge for it. The learned judge seems to have dealt with the case as though s. 11, and not s. 8, of the Act was applicable. I can see no justification for such a view. This case falls under s. 8 and not under s. 11. Consequently, this appeal must be allowed and judgment entered for the plaintiffs for the 75*l*. 10*s*. claimed, with costs.

Appeal allowed.

Solicitors for plaintiffs: *Lieberman, Leigh & Co.*
Solicitors for defendants: *Aukin, Courts & Co.*

J. L. D.

(1) [1900] 1 Q. B. 740.

C. A.

1941

May 28; *June* 10, 20.

HAZEL *v.* EDWARDS.

Emergency legislation—Landlord and tenant—War damage—"Multiple "Lease"—Meaning—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *ss.* 15, 24.

The lease of a single hereditament does not become a "multiple "lease" within the definition in s. 24 of the Landlord and Tenant (War Damage) Act, 1939, merely because the tenant, there being no covenant to the contrary in the lease, sublets portions of that which was let to him as a whole.

For a lease to be a "multiple lease" within the definition it must be a lease of premises of which the use or adaptation for "use as two or more separate tenements" is contemplated at the time when the lease was granted or a licence given by the landlord to enable the tenant to convert the premises so as to adapt them for use as two or more separate tenements.

So held by the Court of Appeal (MacKinnon, Goddard and du Parcq L.JJ.) reversing the decision of the Shoreditch County Court judge.

Appeal from His Honour Judge Englebach sitting at Shoreditch County Court.

The following statement of the facts is taken from the judgment of Goddard L.J. By a lease dated July 25, 1922, the respondent to this appeal (David Hazel) demised to the appellants (William Edwards and H. S. Edwards) the land and buildings thereon known as 14 to 18 Nile Street, Hoxton, for a term of twenty-one years from September 29, 1922, at a yearly rent of 1700*l.*, the tenants having the option to renew the lease for a further period of twenty-one years. The premises demised consisted of a basement and ground floor and four storeys above the ground floor and were let to the appellants and used by them as a warehouse. In 1935 the appellants sublet the basement and ground floor to one Tipper, whose assignees, the London Tube Co., Ld., are still in occupation of that part of the premises. In 1936 the first, second and third floors were sublet to Lovell & Christmas, Ld., who subsequently assigned the sub-lease to Leicester, Lovell & Co., Ld. In 1938 the top floor was sublet to one Whiting, and both Leicester, Lovell & Co. and Whiting were in occupation under the sub-leases on September 8, 1940, when the premises sustained war damage. The aggregate of the rents obtained under the sub-leases was considerably less than that payable under the head-lease, which no doubt accounts, in part at any rate, for some of the difficulties which have arisen in this case but is not a matter which can affect the rights of the parties under the Act which we have to consider. As the result of war damage on September 8 the roof and top floor of the premises were wholly destroyed, and considerable damage, including the destruction of the lift, was occasioned to the three floors occupied by Leicester, Lovell & Co. On September 26, the appellants served on the respondent a notice of disclaimer of their lease. They had on September 18 received a notice of disclaimer of his sub-lease from Whiting, but Leicester, Lovell & Co. did not serve a notice of disclaimer of their sub-lease till October 11.

On October 17, 1940, the respondent applied to the county court under s. 15 of the Landlord and Tenant (War Damage) Act, 1939, to have it determined whether the appellants should be allowed to disclaim the lease of July 25, 1922, either wholly or as respects one or more of the separate tenements comprised in the lease. He contended that the lease was a multiple lease so that the provisions of s. 15 applied and that the extent of the damage did not render it equitable to allow the lease to be wholly disclaimed. There was an alternative application under s. 9 of the Act which is not considered by the county court judge or in this appeal.

The county court judge found that the premises comprised within the lease were "used or adapted to be used as two or "more separate tenements" and that the lease was therefore a "multiple lease" within the definition in s. 24 of the Act of 1939 (1). He then proceeded to consider the evidence given before him as to the extent of the damage to the premises and in conclusion said that having regard to the provisions

(1) Landlord and Tenant (War Damage) Act, 1939, s. 24: "In "this Act unless the context "otherwise requires the following "expressions have the meanings "hereby respectively assigned to "them, that is to say— . . . . "'Multiple Lease' means a lease "comprising buildings which are "used or adapted for use as two "or more separate tenements."

of sub-ss. 3 and 4 of s. 15 he was not satisfied that it was equitable to allow the lease to be wholly disclaimed. He thought it was equitable to allow it to be disclaimed as regards the top tenement only.

The appellants appealed. The bulk of the arguments were directed to the question whether appellants ought not to be allowed to disclaim the tenement forming the first, second and third floors of the premises as well as the tenement forming the fourth floor of the tenement, and it was only during the reply that the court raised the question whether the lease of July 25, 1922, was a multiple lease so as to bring the matter within s. 15 of the Act, and it was this question only that was dealt with on the appeal.

Safford for the appellants.
Turner Samuels for the respondent.

Cur. adv. vult.

The judgment of the Court (MACKINNON, GODDARD and DU PARCQ L.JJ.) was read by Goddard L.J.

GODDARD L.J. [after stating the facts:] On October 17 the respondent made an application to the judge of the Shoreditch County Court under s. 15 of the Landlord and Tenant (War Damage) Act, 1939, a section which deals only with what is called in the Act a multiple lease. In respect of that class of lease the procedure under s. 15 is substituted for that under s. 6, which is the section under which a landlord can apply to the court to determine whether the notice of disclaimer is of no effect on the ground that the premises in respect of which a notice of disclaimer has been served were not unfit by reason of war damage when the notice was served. The other provisions of the Act, excluding those applicable only to ground floors, apply equally to multiple and other leases. In his application the landlord alleged that the premises were not unfit, or, alternatively, that the extent of the war damage did not render it equitable to allow the lease to be wholly disclaimed. He also made an alternative application under s. 9

of the Act for the modification of the operation of the notice of disclaimer as the court might deem proper; but as the court dealt with the application under s. 15 no question arose in the county court under s. 9. His Honour heard the application on three occasions and on March 5 delivered a full and careful judgment. He divided the lease into two parts, as the section authorizes, the disclaimable portion comprising only the top floor, and apportioned the rent between the disclaimable and non-disclaimable portions and gave certain other directions which it is unnecessary to set out in detail. The main question argued in this court was whether he ought not to have included in the disclaimable portion the part sublet to Leicester, Lovell & Co. and disclaimed by them, and on this matters of considerable difficulty arose. We, however, do not propose in this case to express any opinion upon them, because, although in the county court both sides accepted the position that this was a case of a multiple lease, on the appeal this Court took the point whether the whole proceedings were not misconceived in that as between these parties the lease could not be regarded as multiple. The definition of a multiple lease in the Act is "a lease comprising buildings "which are used or adapted for use as two or more separate "tenements"; and the question is whether in the case of a single demise by a landlord to a tenant and a sub-demise by that tenant of portions of the building to separate tenants that renders the first tenancy a multiple lease. Opinion on this point was expressly reserved by this court in *Boudou* v. *Thornton-Smith* (1) and it has now to be decided.

In some cases no difficulty would arise in deciding the question. If a block of flats or offices, obviously adapted and designed to be let to separate tenants, were let by A to B, clearly that would be a case of a multiple lease. So also if a tenant obtained from his landlord a licence to convert and converted what had hitherto been one house into a number of flats, the lease would then become a multiple lease within s. 15. But does the lease of a single hereditament become a

(1) [1941] 1 K. B. 561.

multiple lease merely because the tenant, there being no covenant to the contrary in the lease, sublets portions of that which was let to him as a whole? In our opinion it does not. We think "used or adapted for use" must have relation to the use or adaptation contemplated at the time when the lease was granted or the licence obtained. It will be observed that the rights of an occupying sub-tenant are safeguarded by s. 8, sub-s. 2. A sub-lease by virtue of which any person is entitled to the actual occupation of the land comprised in a disclaimed lease or of any part thereof is unaffected by a notice of disclaimer served on the head landlord by the landlord of the sub-tenant. From this it would appear that if the sub-letting was valid, not being in violation of any covenant of the head lease, the sub-tenant can remain if he wishes and would become the tenant of the superior landlord. Then by s. 9, sub-s. 1 (*b*), provision is made for safeguarding the interest of any sub-lessee although he may not be in actual occupation. It is clear, therefore, that it is unnecessary to hold that for the protection of sub-tenants' rights a single lease becomes a multiple lease merely because there has been sub-letting. In our opinion, where premises are let for occupation as a single hereditament the lease remains what for the purpose of convenience we have called a single lease, though that expression is not found in the Act, and does not become a multiple lease because the tenant has elected to let off parts of the building to sub-tenants. It follows that in the present case the landlord can either accept the notice of disclaimer or serve a notice to avoid disclaimer. If he adopts the first course the London Tube Co., who are in occupation of the ground floor and basement, will become his tenants and he can please himself as to what repairs he does to the remainder of the building. If he decides to serve notice to avoid disclaimer he comes under the obligation to repair the whole of the war damage as soon as is reasonably practicable, and in the case of the top floor it may well be that it will not be practicable to do the repairs while the war lasts. But he will have the rights given to him by the combined effect of s. 11, sub-s. 1 (*c*), and s. 10, sub-s. 1 (*c*), as soon as he has repaired part to apply that a rent may be fixed

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for that part which has been rendered capable of beneficial occupation.

The result is that the appeal is allowed and the order of the court below is set aside and the application under s. 15 is dismissed as incompetent. If the respondent so desires, the matter may be remitted to the county court for his alternative application under s. 9 to be considered, though it would seem doubtful if in the circumstances any useful purpose would be served thereby. If the respondent desires an opportunity of considering whether he will yet serve a notice to avoid disclaimer, the court will, under s. 5, sub-s. 4, extend his time for serving the notice for twenty-one days from to-day. There will be no costs to either party here or below.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Waller, Neale & Houlston; H. C. Morris, Woolsey, Morris & Kennedy.*

H. C. G.

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Sept. 23, 24;
Oct. 18.

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April 29.

THE KING v. HESTON AND ISLEWORTH RATING AUTHORITY AND ANOTHER.

Ex parte CONTI.

Rates—Valuation—Amendment of list—Proposal by town clerk on direction of finance committee of rating authority—Delegation of duties by authority to committee—Confirmation by authority after service of proposal on ratepayer—No new valuation of premises before proposal—Rating authority "party aggrieved"—Form of proposal—Amount of intended alteration in assessment not stated—Validity—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 1, *sub-ss.* 1, 2; *s.* 37, *sub-ss.* 1, 2.

In February, 1939, a borough council, as rating authority, received from the county valuation committee a request that, in view of the decision in *Robinson Bros.* (*Brewers*), *Ld.* v. *Durham County Assessment Committee*, [1938] A. C. 321, the authority should make proposals under s. 37, sub-s. 2, of the Rating and Valuation Act, 1925, for the re-assessment of licensed premises in its area. By the standing orders of the borough council it was the duty of the finance committee of the council "to prepare the borough "valuation list and to consider and report when necessary on all "matters arising under the Rating and Valuation Acts," and the town clerk of the borough brought the request of the county valuation committee before the finance committee on February 21 and March 21, 1939. On the latter date the finance committee determined that proposals for the amendment of the valuation list in respect of the licensed premises within the borough be made and signed by the town clerk who forthwith made a proposal to increase the values of the B. Arms. The proposal did not state the amount by which it was proposed that the assessment should be increased, but merely that the proposal was for the amendment of the valuation list "by increasing the gross and "rateable values of the hereditament . . . . so as to accord "with the judgment of the House of Lords in *Robinson Bros.* "(*Brewers*), *Ld.* v. *Durham County Assessment Committee*" (*supra*). On March 28, 1939, the matter came before the borough council who confirmed the action of the finance committee. Before the proposal no new valuation of the hereditament had been made.

Held, by Charles and Singleton JJ., Hawke J. dissenting, that, although the proposal had been made and served on the ratepayer before the borough council approved the action of the finance committee, it must be taken to be the proposal of the council as rating authority and valid under s. 1, sub-ss. 1 and 2, of the Rating and Valuation Act, 1925.

Held, further, by all the members of the Court, (1.) that, in view of the fact that the effect of the decision in *Robinson Bros.* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (*supra*) in increasing the rateable value of licensed premises generally and that the circumstances of the B. Arms in particular were well known to all parties concerned, there was no need to make a new valuation of the premises before the rating authority could be a "person aggrieved" within s. 37, sub-s. 1, of the Act of 1925 so as to be entitled to make a proposal for the amendment of the valuation list; (2.) that the proposal was valid as sufficiently specifying the grounds on which it was supported, as required by s. 37, sub-s. 2, although it did not state the amount by which it was proposed that the assessment should be increased.

APPLICATION for an order of prohibition.

The following statement of the facts is taken, with some amplification, from the judgment of Singleton J.:—

In February, 1939, the county valuation committee of Middlesex (whose duty it was under s. 18, sub-s. 2, of the Rating and Valuation Act, 1925, to promote uniformity in valuations), having considered the position arising out of the decision of the House of Lords in *Robinson Bros.* (*Brewers*), *Ld. v. Durham County Assessment Committee* (1), resolved that the rating authorities in the county be asked to make proposals before March 31, 1939, in respect of all on-licensed premises, and they resolved that, in the event of any authorities not being willing to do so, such proposals be lodged by the county valuation committee. This was passed on to the Heston and Isleworth borough council, the rating authority for the Heston and Isleworth rating area, by letter of February 13, 1939, and, in accordance with the usual practice, the town clerk of the borough of Heston and Isleworth brought it before the finance committee of the borough council who considered it on February 21 and again on March 21, 1939. By the standing orders of Heston and Isleworth borough council it was provided that: "The powers and duties of the finance committee shall, "so far as the borough council may legally delegate such powers "and duties, be as follows . . . . (7.) to prepare the borough "valuation list and to consider and report when necessary on "all matters arising under the Rating and Valuation Acts, or "any Act or Acts amending or affecting the same." On the latter date they determined that proposals for the amendment

(1) [1938] A. C. 321.

of the valuation list in respect of the eighty-three on-licensed premises within the borough be made and signed by the town clerk in accordance with s. 37 of the Rating and Valuation Act, 1925. Accordingly, the town clerk, purporting to act on behalf of the rating authority, made (inter alia) a proposal for the amendment of the valuation list by increasing the gross and rateable values of the Berkeley Arms, Hounslow, which stood in the list at 700*l.* and 580*l.* respectively. The proposal did not state the amount by which it was proposed that the assessment of the premises should be increased. It merely stated that the proposal was "for amendment of the "said [valuation] list by increasing the gross and rateable "values of the hereditament . . . . so as to accord with the "judgment of the House of Lords in *Robinson Bros. (Brewers),* "*Ld.* v. *Durham County Assessment Committee*" (1). On March 28 the matter came before the council and it was resolved "that the action of the finance committee, in giving instructions "for a proposal to be made and signed by the town clerk in "accordance with s. 37 of the Rating and Valuation Act, 1925, "in respect of each hereditament included in the schedule "submitted by the borough treasurer to the committee at "their meeting on March 21, 1939 . . . . be approved and "confirmed." Shortly before April 15 the applicant, Primo Carlo Conti, who at all material times was the occupier and licensee of the Berkeley Arms, gave notice of his objection to the proposal. This was followed by a notice from the borough treasurer that the objection would be heard by the assessment committee on May 10, 1939, and by a notice from the county valuer that the county valuation committee intended to appear and to oppose the objection, or, in other words, to support the proposal. From that time onwards many months were spent in discussions with the occupiers, or more often with the owners, in endeavouring to arrive at agreement on the values of on-licensed houses within the county after the introduction of the new element. Agreement was reached in nine hundred and thirty-two cases out of one thousand and eighty-eight, and in all except fifty there was an increase in the valuation, the fifty remaining as they were before. In May and June, 1939, Mr. Milne, a valuer acting for the applicant or for the owners of the Berkeley Arms, inspected the minutes and records of the rating authority and he discovered that the proposal had been made before the date of the resolution of the council approving the minutes of the finance committee. On June 17, 1940, the applicant obtained leave to apply for an order of prohibition to prohibit the Heston and Isleworth borough council, as rating authority, from proceeding with, and the South Middlesex assessment committee from hearing and determining, a proposal purporting to have been made by the council on March 21, 1939, for the amendment of the valuation list then in force for the area by increasing the gross and rateable values of the Berkeley Arms. The grounds on which the relief was sought were that the proposal was invalid and inoperative in law because (*a*) it was not made by the council, but was made by the finance committee of the council, and the committee had no power delegated to it by the council or otherwise to make the proposal; (*b*) at the time when the proposal was made the council was not either itself or through the finance committee aggrieved by any incorrectness or unfairness in the valuation list in respect of the hereditament, because neither the council nor the finance committee nor the Middlesex County valuation committee (at whose request the proposal was made) had made or caused to be made any valuation of the hereditament or any enquiry into the facts relevant to such a valuation; and (*c*) the proposal did not state the amount by which it was proposed that the assessment of the hereditament be increased.

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(1) [1938] A. C. 321.

Comyns Carr K.C. and *F. Grant* for the applicant. The proposal is bad. When the finance committee made it they had no authority to do so. Under the standing orders of the borough council (No. 72, para. 7), the committee have the power and duty to prepare the borough valuation list, but otherwise on rating matters they are merely to consider and report to the council. The making of a proposal for the amendment of an existing valuation list does not come within the power given by that standing order to prepare a valuation list, but it comes within the second part of the standing order, and all the committee is empowered to do is to consider the proposal and to report thereon. Preparing a valuation list and making a proposal for the amendment of an existing list are dealt with by different sections of the Rating and Valuation Act, 1925. Furthermore, the borough council had no power to ratify the proposal on March 28, 1939, as they claimed to do. When a person or body can only do an act by virtue of a statutory power they must do it in the mode prescribed by the statute, and there cannot be a ratification of the exercise of the statutory power if it is sought to be performed in any other manner: see Bowstead on Agency, 9th ed., art. 27. Here the suggested ratification was made after the proposal had been served on the applicant. It was then already a nullity, and the council could not make valid a proposal which had been invalid when it was served. An attempt was made in *In re the Gloucester Municipal Election Petition*, 1900. *Ford* v. *Newth* (1) to justify the ratification of the exercise of a statutory power, but the attempt failed. In that case the Divisional Court followed *Bird* v. *Brown* (2), where Rolfe B. said (3) "But this doctrine must be taken "with the qualification, that the act of ratification must take "place at a time, and under circumstances, when the ratifying "party might himself have lawfully done the act which he "ratifies." Secondly, the proposal was null and void because at the time it was made neither the finance committee nor the borough council nor any other person was aggrieved by the incorrectness or the unfairness of any matter in the valuation list as no new valuation of the premises had been made and the assessment committee had no evidence before them that the existing valuation was wrong. In the third place the proposal is null and void as it did not state the figures to which the assessment committee wished the valuation to be increased, thus leaving the ratepayer in doubt of what increase in the valuation was being asked for. It is true that in *Rex* v. *West*

(1) [1901] 1 K. B. 683.
(2) (1850) 4 Exch. 786.
(3) 4 Exch. 799.

Norfolk Assessment Committee. Ex parte Ward (1) both Scrutton L.J. and Greer L.J. expressed the view that it was not necessary in a proposal for a proposer to state the precise figure to which it was desired that the valuation should be altered but that it was sufficient if the proposal stated the way in which it was desired to have the list amended, namely, by a reduction in the total assessment without stating the amount of the reduction. But those expressions of opinion were obiter and not necessary for the decision of that case. Those dicta were founded on the decision of the House of Lords in *Gateshead Union Assessment Committee* v. *Owners of Redheugh Colliery, Ld.* (2). In *Rex* v. *Thanet and District Assessment Committee. Ex parte Isle of Thanet Gas Light and Coke Co.* (3), a proposal was made by a county valuation committee for an amendment of the valuation list "to such an amount as may be "determined on an approved apportionment of the cumulo "value of the undertaking having regard to the accounts "relating thereto in respect of the year ended December 31, "1937," and it was held by the Divisional Court that the proposal did not sufficiently specify the grounds on which the proposed amendment was supported, and that the proposal was, therefore, invalid. Before the passing of the Rating and Valuation Act, 1925, a rating authority was bound to state in a supplementary valuation list the figures to which it wished the current valuation list to be amended. The Act of 1925 impliedly requires it still to do so, because by s. 37, sub-s. 2, every proposal for the amendment of a current valuation list "must . . . . specify the grounds on which the "proposed amendment is supported." On the facts, the lapse of a year since the service of the proposal is no ground for the refusal of a writ of prohibition, which is a writ granted ex debito justitiæ, see *Rex* v. *Tristram* (4) and *Farquharson* v. *Morgan* (5). *Parochial Church Council of St. Magnus* v. *Chancellor of London Diocese* (6) is not an authority for the contrary proposition.

(1) (1930) 94 J. P. 201.
(2) [1925] A. C. 309.
(3) [1939] 2 K. B. 640.
(4) [1902] 1 K. B. 816.
(5) [1894] 1 Q. B. 552.
(6) [1923] P. 38.

Craig Henderson K.C. and *H. B. Williams*, for the rating authority and the assessment committee, were not required to argue the second and third points. With regard to the powers of the finance committee, the borough council had authority to delegate their powers in connection with the preparation of a valuation list to their finance committee and they did so by standing order 72. Every licensed house was valued according to the principles laid down in *Bradford-on-Avon Union* v. *White* (1) until the House of Lords held in *Robinson Bros.* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (2) that the former decision was wrong. After that decision the assessments of licensed premises were not in accordance with the Rating and Valuation Act, 1925. By the proposal in the present case the rating authority were seeking to make correct a valuation list which had been incorrect, but what the finance committee did was the preparation of a valuation list. In any case, if what the finance committee did was not a part of the preparation of the valuation list, the council had power to ratify the act of the finance committee who in effect had considered the matter and made a report which the council approved. That amounted to a valid ratification of the act of the finance committee. An act done in exercise of a statutory power can be ratified: see *Firth* v. *Staines* (3); *Rex* v. *Chapman. Ex parte Arlidge* (4), per Atkin J., who said: "The true line of demarcation appears "to me to be that if the act is done by a committee who are "given by statute authority to exercise the discretion of "the council it will be valid if afterwards adopted by the "council." In *Bowyer, Philpott & Payne, Ld.* v. *Mather* (5) the decision was the other way, but that turned on the wording of a special statute. A writ of prohibition is a discretionary writ and a discretionary writ is not granted in a case where there are no merits. Here there was laches because the applicant might have found out the facts much earlier. [*Mayor of London* v. *Cox*, per Willes J. (6) and

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(1) [1898] 2 Q. B. 630.
(2) [1938] A. C. 321.
(3) [1897] 2 Q. B. 70.
(4) [1918] 2 K. B. 298, 306.
(5) [1919] 1 K. B. 419.
(6) (1867) L. R. 2 H. L. 239, 279.

Lilley & Skinner, Ld. v. *Essex County Valuation Committee* (1) were cited.]

Comyns Carr K.C. replied.

Cur. adv. vult.

1941. April 29. HAWKE J. read the following judgment. I have read the judgment which Singleton J. is about to deliver and I have discussed it with him and Charles J. Unfortunately, I am not in agreement with them as to what the result of this case should be. I regret it because my view involves the acceptance of pure technicalities, and is one which, apart from such technicalities, must admittedly be without any merits. As, however, I have formed a view I must express it.

Admittedly, the rating authority could delegate to their finance committee their powers with regard to rating. To a very large extent they did so, but I do not think that they included in the powers delegated the right to decide without reference to the council whether proposals should be made for the revaluation of hereditaments within their area. The committee, on March 21, 1939, made such a proposal with regard to the premises occupied by the applicant and served it on him on March 23. They referred this to the council who, on March 28, approved the action of the committee, but this was after the proposal had been served on the applicant. It is on this ground, among others, that the application is now made for the writ of prohibition to prevent action on the proposal in question.

It is said on behalf of the applicant that there was no effective proposal, and that, as the proposal was not made by the only persons who had in the circumstances jurisdiction to make it, namely, the council, a subsequent approval by the council could not cure the defect. On this point four cases were cited by Mr. Comyns Carr, *St. Leonard's, Shoreditch, Vestry* v. *Holmes* (2); *Firth* v. *Staines* (3); *Rex* v. *Chapman. Ex parte Arlidge* (4) (which two latter cases he distinguished

(1) (1935) 51 Times L. R. 432.
(2) (1886) 50 J. P. 132.
(3) [1897] 2 Q. B. 70.
(4) [1918] 2 K. B. 298.

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on the facts), and *Bowyer, Philpott & Payne, Ld.* v. *Mather* (1). Mr. Carr submitted that, as the power to make proposals for revaluation was a statutory matter, it could be exercised only within the terms of the statute, and that the statute required that the council should exercise its discretion as to the proposal (unless it delegated the power to some other body, which I assume it did not in this case), and must do so before the proposal is made and not by subsequent approval of what some other body has done.

On the sum of these decisions I am driven to the conclusion that Mr. Carr is right, and that no proposal within the terms of the statute was made, and that prima facie the writ of prohibition should be granted. Perhaps it is a little difficult to see why the observations of Wright J. in *Firth* v. *Staines* (2) should not cover the matter, especially as it would not be right to assume that the principal would not exercise his discretion on the matter when deciding whether or not to ratify, but I think the cases cited, as a whole, decide otherwise: see, particularly, *Bowyer, Philpott & Payne, Ld.* v. *Mather* (1) and Avory J. in *Rex* v. *Chapman. Ex parte Arlidge* (3).

It was, however, said on behalf of the council that the issue of the writ was discretionary, and that, having regard to the lapse of time which had taken place, it ought not to issue. I feel a great deal of doubt on this point, but, inasmuch as the delay involved was, for the greater part, due to the desire of both parties to arrive at a settlement so as to avoid litigation, I am not prepared to say that the delay is in this case sufficient ground for refusing the issue of the writ.

On Mr. Carr's other points I am entirely in agreement with my brethren. It does not seem necessary to repeat their views.

CHARLES J. I have read and discussed the judgment which is about to be delivered by Singleton J. Inasmuch as it was with entire truth, but perhaps somewhat cynically, admitted by Mr. Comyns Carr that this was a matter entirely without merits I do not propose to deliver any judgment of my own. I adopt the judgment of Singleton J.

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(1) [1919] 1 K. B. 419.
(2) [1897] 2 Q. B. 75.
(3) [1918] 2 K. B. 308.

SINGLETON J. read the following judgment. As from the decision of the House of Lords in *Robinson Bros.* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (1) (which decision was given on March 17, 1938) a new element was introduced into the valuation of licensed premises. The Berkeley Arms, Bath Road, Hounslow, was owned by Messrs. Benskins (Watford) Brewery, Ld., but until the decision already mentioned it was not open to the rating authority in valuing the hereditament, or to the assessment committee in coming to a decision as to the value, to have regard to the rent which brewers as such might be prepared to pay for the premises, and the value had to be determined as the amount which a hypothetical tenant would pay disregarding the rent which brewers as possible hypothetical tenants would be prepared to pay. The decision in *Bradford-on-Avon Union* v. *White* (2), which had stood for many years, was overruled. It can surely be said that everyone conversant with such matters realized that the introduction of this element would mean in a normal case an increase in the value of licensed premises. The matter is dealt with in an affidavit by Mr. Harfield, the county valuer for Middlesex, in this way: "At this meeting (January 19, 1939) the unanimous opinion "of the valuers including myself was that there was a prima "facie case for an increase in the assessment of every on-"licensed house in the county. It was pointed out, as is the "fact, that, out of a total of 1088 on-licensed premises in "the county, only 27 were not already owned by brewers, "and that in the greater part of the county there had been "abnormal development in recent years with a consequent "increase in population which in turn led to an increase in "the brewers' demand for houses. It was our opinion that "brewers would compete for every licensed house in the county "and that prima facie they might reasonably be expected to pay "higher rents than were represented by existing assessments."

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(1) [1938] A. C. 321.

(2) [1898] 2 Q. B. 630.

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In view of that and of the fact that the Berkeley Arms was well known to those who suggested the making of the proposal and of those who made it, the argument of Mr. Comyns Carr that the rating authority cannot be said to be a "person aggrieved" within s. 37, sub-s. 1, of the Rating and Valuation Act, 1925, fails. The facts generally were known and I do not see any necessity for a new valuation to be made before it can be said that either rating authority or ratepayer is aggrieved, especially in a case in which the trade figures could not be obtained.

It is then submitted that the proposal is bad because it does not state the figures proposed to be inserted in place of the old figures of 700*l.* gross and 580*l.* rateable value. A considerable time was occupied by Mr. Comyns Carr on this point on which this court had expressed its view in *Rex* v. *Thanet and District Assessment Committee. Ex parte Isle of Thanet Gas Light and Coke Co.* (1) following the words of Scrutton L.J. and Greer L.J. in *Rex* v. *West Norfolk Assessment Committee. Ex parte Ward* (2). I refer to two passages in *Rex* v. *Thanet and District Assessment Committee*, the first being in the judgment of Lord Hewart C.J. (3). The Lord Chief Justice said in that case: "Our attention has been directed to *Rex* v. "*West Norfolk Assessment Committee. Ex parte Ward* (4). I "need not reiterate the facts of that case, but I observe that "Scrutton L.J., in his judgment used these words: 'One "'point in this case may arise as to whether a proposal for "'amendment which does not state what amendment is "'proposed, is a good proposal'; and Greer L.J., in his "judgment said: 'It seems to me to be sufficient if his "'proposal says that he desires to have the list amended "'and states the way in which he desires to have it "'amended, namely, by the reduction of the total assess- "'ment without stating the amount of the reduction "'which he is going to ask the assessment committee "'to approve.' But can it fairly be said here that "this so-called proposal does state what amendment is

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(1) [1939] 2 K. B. 640.
(2) (1930) 94 J. P. 201.
(3) [1939] 2 K. B. 649.
(4) 94 J. P. 201.

"proposed? I agree that it matters not whether that "which is proposed translates itself into terms of reduction or "into terms of increase, but who can say what it is that is "proposed here? The matter seems to me to be left altogether "too vague." The other passage is in my own judgment in that case: "The proposal does not show what amendment "it is proposed to make. In *Rex* v. *West Norfolk Assessment* "*Committee. Ex parte Ward* (1) it was decided in the "Court of Appeal that it was not necessary in a proposal "for the proposer to state the precise figure to which he desired "that the valuation should be reduced. It is clear from the "judgments of Scrutton L.J. and Greer L.J., to which my "Lord has referred, that at least the nature of the amendment "must be indicated." I should add that Avory J. had expressed the same view in the case of *Lilley & Skinner, Ld.* v. *Essex County Valuation Committee* (2). The proposal in the present case was "for amendment of the said list by increasing the "gross and rateable values of the hereditament . . . . so as "to accord with the judgment of the House of Lords in "*Robinson Bros. (Brewers), Ld.* v. *Durham County Assessment* "*Committee* (3), the present values being insufficient, incorrect "and unfair." I see no reason for departing from the views already expressed. Indeed, I consider that the matter is concluded, so far as this court is concerned. Mr. Comyns Carr submitted that in the cases referred to the observations in the various judgments of the Lords Justices on the point were obiter dicta. If they were (and I do not think that they ought to be so considered) this court would adopt their view as applicable to this case. This proposal is in form sufficient to comply with that which the Rating and Valuation Act, 1925, requires. Sect. 37, sub-s. 2, provides: "Every "proposal made under this section must—(*a*) be made in writing "and, except where it is made by the rating authority, be "served on the rating authority; (*b*) specify the grounds on "which the proposed amendment is supported."

A more difficult point arises on the objection taken on behalf of the applicant that the proposal bearing date March 23, 1939, was not made by the rating authority. Sect. 1, sub-s. 1, of the Act of 1925 provides: "The council of every county borough "and the council of every urban and rural district shall be "the rating authority for the borough or for the county "district, and from and after the appointed day no authority "or person other than the council shall have power to make or "levy any rate within the borough or district." The rating authority in this case was the council of the borough of Heston and Isleworth. Objection is taken that the proposal was not made by the rating authority but by the finance committee of the rating authority and that consequently there is no jurisdiction in the assessment committee to hear and determine the question. In the statement delivered by the applicant at the time the application was made the ground is stated in this way. Ground (*a*) is: "That the said proposal is "invalid and inoperative in law because it was not made "by the said council, but was made by the finance committee "of the said council, and the said committee had no power "delegated to it by the said council or otherwise to make the "said proposal." The proposal is signed by the town clerk and purports to have been given on behalf of the rating authority. Rating matters were normally dealt with by the finance committee, but the application to them by the council is in somewhat limited terms: "To prepare the borough "valuation list and to consider and report when necessary "on all matters arising under the Rating and Valuation Acts, "or any Act or Acts amending or affecting the same." It is pointed out that the making of a proposal for revision or amendment of a current valuation list under the powers given by s. 37 is a different thing from preparing the valuation list under ss. 25 to 30, and it is said further that in making such a proposal the finance committee were going beyond their powers.

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(1) 94 J. P. 201.

(2) 51 Times L. R. 432.

(3) [1938] A. C. 321.

[His Lordship stated the facts as set out above and continued:] Hence the submission that the proposal is bad because it is said that it was not made by the council, the rating authority. It is admitted that the contention is highly technical and that it has no merits. Now, it is right to say that the delegation to the finance committee does not strictly embrace the making of proposals for amendment of the current valuation list. Those are matters which they may consider and on which they may report, and they did so. Before their report was approved and confirmed they had caused a proposal to be made. At the same time the proposal purported to be made on behalf of the rating authority and within a few days, namely, on March 28, the rating authority passed a resolution approving and confirming the action of the finance committee. It is clear that the rating authority adopted the proposal as their proposal on March 28, and that they could not thereafter be heard to say that it was not theirs, even if they could have done so beforehand, which is doubtful having regard to the fact that it was given by the town clerk in their name.

Authorities were cited to us by counsel on both sides on the subject of ratification. Those authorities appear to me to be conflicting, and I do not gain any great help from them. They refer to matters in no sense akin to the question before this court. The Rating and Valuation Act, 1925, prescribes a means of bringing before the assessment committee the party who says that an assessment ought to be altered and the party who objects to that proposal. The procedure is laid down by the statute and must be followed. At the same time, one is not dealing with an information or with anything of a penal nature. The proposal was made by the town clerk in the name of the rating authority. It was adopted by the rating authority on March 28, that is, before the expiration of the then current year for rating purposes and before the ratepayer gave notice of objection. The town clerk was the person who normally would give a notice or make a proposal on behalf of the rating authority. He did so, and, in so far as the applicant is concerned, I do not see that it is necessary that there should be a resolution of the council (the rating authority) authorizing him to do that. He did it after the decision of the finance committee and in the belief that the rating authority would approve, and they did so when the matter came before them. I find that in *Brooks, Jenkins & Co,*

v. *Torquay Corporation and Newton Abbot Rural District Council* (1), it was held by Walton J. that an urban authority could confirm under seal a contract already made but not under seal, and so satisfy the requirements of s. 174 of the Public Health Act, 1874, and of the common law. I do not regard that as in any sense covering the present case, but it may be said that the local authority, by its confirmation or adoption of what had gone before, was covering the oversight of its officer, its clerk, in so far as it was necessary to do so. Walton J. said (2): "But, apart altogether from this, I think "that the confirmation by the council under their seal of the "original retainers created an obligation binding upon the "council without any new consideration."

In all the circumstances, I am of opinion that Mr. Comyns Carr's submission fails, and that we ought to hold that the proposal was the proposal of the rating authority. Quite clearly they adopted it as theirs as from March 28. Such a decision is at least in accord with common sense, for in practice the conduct of such matters is left by the rating authority to the finance committee. Moreover, the rating authority approved the action of the town clerk, and it is to be remembered that the proposal was brought about by the county valuation committee who themselves would have made a proposal if the rating authority had shown any reluctance to do so, and who, in fact, gave notice of intention to appear after the ratepayer gave notice of objection to the proposal. It would, indeed, be unfortunate if we were compelled to hold otherwise, for it would mean that, while other ratepayers had had their assessments increased, it would not be open to the assessment committee to consider the assessment of the Berkeley Arms, and for two years that hereditament would escape any increase in assessment, with the result that the efforts of the county valuation committee to promote uniformity would be defeated.

I will add a word or two about the relief sought. It is argued by the respondents that the grant of a writ of prohibition is discretionary and that we ought not to grant it in

(1) [1902] 1 K. B. 601.

(2) Ibid. 607.

the circumstances of the present case. I quite agree that we ought not to do so if we have a discretion, but, if it be right to say that the proposal is bad and that consequently the assessment committee has no jurisdiction to hear and determine the matter, I do not think that we have any such discretion. The point could, perhaps, have been taken before the assessment committee by amendment of the notice of objection, and, if the proposal had been held to be bad then, the assessment committee would have been bound to hold that they had no jurisdiction, and although there is nothing to show us that the assessment committee intended to usurp jurisdiction, it seems to me that in the interests of avoiding multiplicity of proceedings we ought to grant the relief asked for if we consider the proposal bad. None the less, it would appear to be a strange result if we were bound to prohibit the assessment committee from going into the matter and thus to prevent them from doing justice between the parties. As I have already said, I hold the opinion that this application fails, and that the proposal should be treated for all purposes as the proposal of the rating authority.

Application refused.

Solicitors for applicant: *Crossman, Block & Co.*

Solicitor for respondents: *H. Swann, Town Clerk, Heston and Isleworth Borough Council.*

G. F. L. B.

1941
Apr. 28, 29.

LATILLA *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax — Avoidance of liability to taxation—Transfer of assets to company abroad—Income enjoyed by residents in United Kingdom—" Income . . . . payable " to company by virtue of transfer —Inclusion of trade profits—Finance Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 34) *s.* 18—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46) *s.* 28, *sub-s.* 2.

A Rhodesian mine was carried on by a partnership until 1933, when two-thirds of the interest in the partnership were vested in Englishwomen ordinarily resident in the United Kingdom, the remaining third being vested in M, a man resident in South Africa. For the protection of the interests of the women partners a company was formed with South African directors, to carry on the mine in partnership with M. By an agreement dated March 20, 1933, the interests of the women partners were transferred to the company in consideration of 10,000 shares of 1*l*., and 250,000*l*. in non-interest-bearing debentures. No dividends were paid on the shares, but a substantial amount of the debentures were redeemed each year:—

Held, that the trade profits of the company constituted income which " became payable " to the company by virtue of the transfer of March 20, 1933, within the meaning of s. 18 of the Finance Act, 1936.

Trustees of Psalms and Hymns v. *Whitwell* (1890) 3 Tax Cas. 7 distinguished.

Held, also, that the Special Commissioners were entitled to find that the transfer for shares and non-interest-bearing debentures was effected mainly for the purpose of avoiding British taxation, and was not a bona fide commercial transaction within the meaning of s. 28 of the Finance Act, 1938.

CASE stated by Special Commissioners of Income Tax.

The appellant, Herbert George Latilla, appealed against assessments to sur-tax, in respect of the years ended April 5, 1936, and April 5, 1937, and an additional assessment in respect of the year ended April 5, 1938. He also appealed against assessments to income tax for the years ended April 5, 1937 and 1938. The question raised by the appeals related to the inclusion in the assessments of sums which had been deemed to be the income of the appellant for the purposes of the Income Tax Acts by virtue of s. 18 of the Finance Act, 1936, and s. 28, sub-s. 2, of the Finance Act, 1938 (1).

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(1) Finance Act, 1936, s. 18: " For the purpose of preventing " the avoiding by individuals " ordinarily resident in the United " Kingdom of liability to income " tax by means of transfers of

1941

LATILLA
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COMMISSIONERS.

About twenty-five years before the material time Ethel May Latilla, the appellant's wife, Jane Johnson, wife of Lieut.-Col. Frank William Frederick Johnson, D.S.O., and John Mack acquired in equal one-third shares a number of mining claims in Rhodesia known comprehensively as the Golden Valley Mine, which was acquired for 10,000*l.* on the liquidation of Golden Valley Mines Co., Ld. At a later date the appellant's wife transferred by way of gift a one-third share of her one-third interest in the mine to each of her daughters Edith Mayo and Gwen Latilla Campbell, and from that time there was a partnership in the business carried on at the mine, consisting of the following persons and shares: Mrs. Johnson, one-third; the appellant's wife, Mrs. Mayo, and

"assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—(1.) Where an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts: Provided that this subsection shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation."

Finance Act, 1938, s. 28, sub-s. 2: "The proviso to subs. 1 [of s. 18 of the Finance Act, 1936] shall cease to have effect and the following two subsections shall be inserted immediately after the said subsection 1:—(1A) [Not material] (1B) The last two foregoing subsections shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners either—(*a*) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or (*b*) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation."

Mrs. Campbell, each one-ninth; and Mr. Mack, one-third. The partners carried on in Rhodesia the business of winning and selling minerals from the mine, and that business was managed and controlled in Rhodesia. The appellant's wife, Mrs. Mayo, and Mrs. Campbell at all material times resided in the United Kingdom. Mrs. Johnson and her husband resided in Rhodesia until March, 1933, and Lieut.-Col. Johnson had looked after his wife's interest in the partnership. In March, 1933, they came to the United Kingdom. Mr. Mack remained resident in Rhodesia. When Lieut-Col. Johnson could no longer remain in Rhodesia, it became necessary that steps should be taken to protect the interests of the partners other than Mr. Mack. Mr. Mack refused to consent to the formation of a limited company to take over the partnership business, but he consented to the transfer to such a company of the partnership rights and interests of the other partners. The Latjohn Trust, Ld. was, accordingly, registered with limited liability under the laws of Southern Rhodesia, and with its registered office at Bulawayo on March 20, 1933. The capital was 10,007*l.* divided into 10,007 shares of 1*l.* each. By an agreement dated March 20, 1933, between Mrs. Johnson, the appellant's wife, Mrs. Mayo and Mrs. Campbell ("the "sellers") of the one part and the company of the other part, after reciting that the sellers were carrying on business in partnership with John Mack at the mine under the style or firm of John Mack & Co., it was agreed that the sellers should sell to the company as from April 1, 1932, the shares and interest of the sellers in the firm of John Mack & Co. for 260,000*l.* to be paid and satisfied by the issue to the sellers of shares and debentures of the company as follows:—

	£1 shares.	*£1 debentures.*
Mrs. Johnson ..	5000	125,000
The appellant's wife	1667	41,667
Mrs. Mayo	1666	41,667
Mrs. Campbell ..	1667	41,666
	10,000	250,000

The debentures were non-interest-bearing debentures.

Mr. Mack formally consented to the sale, and agreed that as from April 1, 1932, all the profits, moneys and other benefits of the sellers not already distributed should accrue to the company instead of the sellers. The company proceeded to carry on the business in partnership with Mr. Mack. It appeared from the company's accounts that its share of the profits of the partnership business was as follows: In 1935, 23,314*l.*; in 1936, 10,931*l.*; in 1937, 19,295*l.* No dividends were declared by the company in 1935, 1936, or 1937, but debentures were redeemed in each of those years as follows: 1935, 24,000; 1936, 22,500; 1937, 20,000. Loans to Mrs. Johnson, the appellant's wife, Mrs. Mayo, and Mrs. Campbell appeared in the company's accounts representing moneys advanced by the company in anticipation of redemption of debentures.

Evidence was given before the Special Commissioners by an accountant who stated that (*a*) he had been associated with the appellant and Lieut.-Col. Johnson for many years and advised them on business matters; (*b*) he visited South Africa in 1932 and 1933 and inspected the mine on behalf of the sellers; (*c*) on Lieut.-Col. Johnson's return to England in 1933 it was essential that the interests of the partners other than Mr. Mack should be safeguarded, and that could best be done by the formation of the company with South African directors; (*d*) the company also afforded limited liability to its shareholders; (*e*) the company was not formed mainly with the object of avoiding British taxation; (*f*) questions of British and Rhodesian taxation were considered on the formation of the company; (*g*) when he advised the issue of non-interest-bearing debentures he had in mind both British and Rhodesian taxation; (*h*) no dividends were declared by the company because it was desired to redeem the debentures and there was a standing instruction that as cash became available it should be used in the redemption of the debentures; (*i*) he agreed that the non-remission of income to the United Kingdom avoided British taxation under Sch. D, Case V., r. 2, and he also agreed that this was pointed out to the parties as a secondary advantage of the scheme; (*j*) he agreed that no double taxation in

Rhodesia would have been incurred by the declaration of dividends by the company; (*k*) since the Income Tax Ordinance of 1918 the company was liable to Rhodesian income tax on its profits. There was, as yet, no income tax on dividends in Rhodesia, but the taxation of dividends had been discussed there, and this matter had to be considered in deciding whether debentures should be issued by the company as part consideration for the share of the business it acquired as aforesaid; (*l*) the avoidance of British taxation was considered, but it was not the main purpose of the formation of the company.

The Special Commissioners held that the transfer of assets effected by the agreement of March 20, 1933, was a transfer of assets within the terms of s. 18 of the Finance Act, 1936, and that, by reason of that transfer, income became payable to the company. They further held that the transfer of partnership interests for shares and non-interest-bearing debentures was effected mainly for the purpose of avoiding British taxation and was not a bona fide commercial transaction. They, therefore, confirmed the assessments.

Tucker K.C. and *Terence Donovan* for the appellants.

Sir Donald Somervell A.-G., *J. H. Stamp*, and *R. P. Hills* for the Crown.

LAWRENCE J. The questions which I have to decide are whether there has been a transfer of assets "by virtue or in "consequence whereof . . . . income becomes payable to persons "resident or domiciled out of the United Kingdom," and, secondly, whether there was evidence on which the commissioners were entitled to come to the conclusion that the transfer in question was not "effected mainly for some purpose other than "the purpose of avoiding liability to taxation." [His Lordship summarized the case stated, and continued:] Mr. Tucker, on the appellant's behalf, admits that the appellant had power, through his wife, to enjoy the income of Latjohn Trust, Ld., within the meaning of s. 18, but he contends that under the transfer no income became payable, within the meaning of that section, to Latjohn Trust, Ld. He relies principally on *Trustees of*

Psalms and Hymns v. *Whitwell* (1), where it was held that trading profits which were made by the trustees were not yearly interest or other annual payments within the meaning of s. 105 of the Income Tax Act, 1842, and *Rex* v. *Special Commissioners of Income Tax. Ex parte Shaftesbury Homes and Arethusa Training Ship* (2), where a testator had bequeathed to trustees a business, the profits of which were by his will to be paid to the Shaftesbury Homes, and it was held that the payment of the profits to the homes was an annual payment under s. 105, on the ground that the homes did not make the profits themselves but had them paid to them by the trustees, and that, therefore, the case was distinguishable from *Trustees of Psalms and Hymns* v. *Whitwell* (1). Mr. Tucker's argument is that trade profits made by a person cannot be said to be "income payable" to him, nor can trade profits made by a partnership be said to be "income payable" to one of the partners. He says that, if the Finance Act, 1936, had intended to strike at trade profits, the words used would have been "income arising to persons resident or domiciled out of the "United Kingdom," and that the words, "income becomes "payable to persons resident . . . . out of the United Kingdom" are totally inapplicable to trade profits which are made by such persons. On the other point, he contended that the commissioners could not reasonably have come to the conclusion that they were not satisfied that the transfer was effected mainly for some purpose other than the purpose of avoiding liability to taxation, and that the words in which they expressed their decision on this point, namely, "We further held that "the said transfer for shares and non-interest-bearing deben-"tures was effected mainly for the purpose of avoiding British "taxation and was not a bona fide commercial transaction," indicated some error of law.

Dealing with the second point first, in my opinion there was evidence on which the commissioners might come to the conclusion to which they came, and there is nothing in the words which they used to indicate that they were in any legal error.

(1) (1890) 3 Tax Cas. 7.

(2) [1923] 1 K. B. 393.

On the first point, it appears to me that it is one thing to say that trade profits are not yearly interest or other annual payments under s. 105 of the Act of 1842, and quite another thing, when an Act to prevent tax evasion refers expressly to income which, by virtue of transfer of assets, becomes payable to A but remains capable of enjoyment by B, to say that it was intended to exclude all income from trade profits. In the statute of 1936 the word "assets" is used in the widest sense. The assets produce income. To whom does the income become payable? Mr. Tucker says that it becomes payable to no one, although in fact it is received by Latjohn Trust, Ld., abroad, and paid over to the appellant's wife in this country. I am unable to accept that argument, and it appears to me that the cases to which he has referred are distinguishable because they were decisions on the construction of an exemption clause in an Income Tax Act which exempted yearly interest or other annual payments, which words had been used in other parts of the Act in contradistinction to trade profits. The Act of 1936 deals with quite a different topic. It is expressly designed to prevent the avoidance of tax by individuals ordinarily resident in the United Kingdom. In a sense it contrasts income which becomes payable to one person, although the power to enjoy it remains with someone else. The words are, in my opinion, amply wide enough to cover the facts of the present case.

I am, therefore, of opinion that the decision of the Special Commissioners was correct on both points, and the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Birkbeck, Julius, Edwards & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

J. W. H.

REX *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS.

1941
May 6, 8, 9, 26.

Ex parte EZEKIEL.

Criminal law—Fugitive offender—Evidence—Depositions—Charge of conspiracy in India—Depositions taken in India in the absence of the accused—Reception in evidence in application for committal under Fugitive Offenders Act, 1881*—Fugitive Offenders Act,* 1881 (44 *&* 45 *Vict. c.* 69), *s.* 29.

By the Fugitive Offenders Act, 1881, s. 29: "A magistrate "may take depositions for the purposes of this Act in the absence "of a person accused of an offence in like manner as he might take "the same if such person were present and accused of the offence "before him. Depositions (whether taken in the absence of the "fugitive or otherwise) . . . . may, if duly authenticated, be "received in evidence in proceedings under this Act. Provided "that nothing in this Act shall authorize the reception of any such "depositions . . . . in evidence against a person upon his trial "for an offence."

The depositions referred to in the second paragraph of the section are depositions which have been taken before a tribunal other than the magistrate, and, if duly authenticated, they are admissible in evidence in proceedings under the Act, although they have not been taken "for the purposes of this Act."

A member of the Bar should not act as witness in a case in which he is engaged as counsel.

APPLICATION for writ of habeas corpus.

On March 7, 1941, the applicant, David Ezekiel, was committed to prison by order of the Metropolitan police magistrate at Bow Street police court to await his return to India in accordance with the Fugitive Offenders Act, 1881. He was later admitted to bail by order of a judge. The charge on which he was ordered to be committed was "that between "January, 1929, and December 31, 1935, he was a party "to a criminal conspiracy with Solomon Ezekiel and other "persons to cheat liquor vendors as well as members of the "public by fraudulently and dishonestly inducing them to buy "and pay for spirits in bottles as genuinely imported foreign "liquor with labels and capsules representing that the contents "thereof were genuinely imported foreign liquors of certain "descriptions and quality and produced and bottled in Scot-"land, England, France and other foreign countries and thereby "committed an offence punishable under s. 120B (Act viii., "1913, s. 3), read with s. 420 of the Indian Penal Code of 1860." By s. 9 of the Fugitive Offenders Act, 1881, it is provided that that part of that Act (which was the material part in the present case) shall apply to certain offences, including every offence which is for the time being punishable in that part of Her Majesty's dominions in which it was committed by imprisonment with hard labour for a term of twelve months or more. Sect. 420 of the Indian Penal Code provides: "Whosoever "cheats and thereby dishonestly induces the person deceived "to deliver any property to any person . . . . shall be punished "with imprisonment" [i.e. "rigorous imprisonment" or imprisonment with hard labour] "for a term which may "extend to seven years." Sect. 120B of the Code provides that whoever is a party to a criminal conspiracy to commit an offence punishable with imprisonment for a term of two years or upwards may be punished in the same manner as if he had abetted the offence. By s. 109 an abettor is liable to the same penalty as the principal offender.

The applicant was for some years before 1929 the principal partner in Davidson & Co., dealers in wines and spirits in Calcutta. In 1931 this firm became Davidsons, Ld., the applicant being the governing director and a principal shareholder in that company. On October 20, 1935, a police raid took place on various premises in Calcutta, including the premises belonging to Davidsons, Ld., and in certain premises there was found an illicit distillery. The result was that thirty-eight persons were arrested, many of them being connected with Davidsons, Ld. The charges against those persons included one similar to that in the present case, the allegation being that certain spirit imported from Java, together with that made in the illicit distillery, was used as the basis of a liquor which was sold to purchasers with false labels and capsules as genuine Scotch whisky or French brandy.

The applicant was not among those arrested on October 20, 1935, having left India in the previous April. He was, however, named in the charges as a co-conspirator with those actually charged. On the application of the Indian Government, a provisional warrant for his arrest was issued by a magistrate at Bow Street police court on November 19, 1935. He was not arrested on that warrant until May 17, 1940, when he arrived at Folkestone as a refugee from Belgium, where he had been living. The Indian warrant required by s. 3 of the Act was dated June 3, 1940, and it was not disputed that it was duly endorsed and authenticated as required by the Act. By s. 5 of the Fugitive Offenders Act it is provided: ". . . . If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such "evidence is produced as (subject to the provisions of this "Act) according to the law ordinarily administered by the "magistrate, raises a strong or probable presumption that the "fugitive committed the offence mentioned in the warrant, "and that the offence is one to which this part of this Act "applies, the magistrate shall commit the fugitive to prison "to await his return." The evidence before the magistrate in this case included depositions taken in India against the thirty-eight persons referred to, and he came to the conclusion that it raised a strong presumption against the applicant.

It was admitted in argument before the Divisional Court that the depositions disclosed the existence of the conspiracy alleged, and, further, that the evidence of one witness clearly implicated the applicant, but it was contended in support of the application: (1.) that the evidence of that witness required corroboration, being that of an accomplice. As to this the court held that, even assuming that his evidence was not corroborated (though in fact it was), in virtue of s. 133 of the Indian Evidence Act, 1872, an accomplice was a competent witness and that a conviction was not illegal merely because it proceeded on his uncorroborated testimony, and a fortiori a committal for trial could not be invalidated on that ground; (2.) that the applicant was not a "fugitive" from India within the Fugitive Offenders Act, 1881, because it was not shown that he had fled from India to avoid arrest. The court held that he was a person accused of having committed an offence in India, and that he had left India, and so came within the definition of a person in the Act referred to as a "fugitive "from" India, and his reason for leaving India in the first instance was immaterial; (3.) that the warrant of June 3, 1940, was bad because it was not expressed to be issued in the terms of or for the purposes of the Fugitive Offenders Act, and also for duplicity. The court held that the warrant was issued by a person who had lawful authority to do so, that it was duly endorsed and authenticated in the United Kingdom for an offence to which ss. 3 and 5 of the Act applied, and that, even if the warrant contained another charge, that did not invalidate the committal on the first charge contained in the warrant, and the further charge could be regarded as mere surplusage. The only matter requiring a detailed report was the objection raised by counsel for the applicant that the depositions taken in India were not admissible in the proceedings before the magistrate at Bow Street police court, under the Fugitive Offenders Act, 1881, because they were not taken "for the purpose of "this Act."

Comyns Carr K.C. and *G. O. Slade* for the applicant.

Roberts K.C., *C. E. Bagram*, and *V. R. Gattie* for the Secretary of State for India in Council.

G. B. McClure for the Home Secretary.

The arguments appear from the judgment of Humphreys J.

Cur. adv. vult.

1941. May 28. Humphreys J. read a judgment in which, after dealing with the other points raised, he said: The remaining objection argued on behalf of the applicant was to the admissibility of the depositions taken in India. The Fugitive Offenders Act, 1881, s. 29, provides in its first three paragraphs, as follows: "A magistrate may take depositions "for the purposes of this Act in the absence of a person accused "of an offence in like manner as he might take the same if "such person were present and accused of the offence before "him. Depositions (whether taken in the absence of the "fugitive or otherwise) and copies thereof, and official certi"ficates of or judicial documents stating facts, may, if duly "authenticated, be received in evidence in proceedings under "this Act. Provided that nothing in this Act shall authorise "the reception of any such depositions, copies, certificates, "or documents in evidence against a person upon his trial "for an offence." The question turns on whether the "depositions" mentioned in the second paragraph of the section must, like those mentioned in the first paragraph, be "depositions taken for the purposes of this Act."

In spite of Mr. Roberts' argument to the contrary, I think that these depositions cannot be said to have been so taken. They may have been taken with the knowledge and perhaps the intention that, if the applicant were arrested, they would be used in his case, but primarily they were taken for the purpose of the trial in India of the persons then before the court and they certainly do not purport to be taken for any purpose of the Fugitive Offenders Act. I have, however, come to the conclusion that the two paragraphs deal with quite different matters and that there is no justification for inserting the word "such" at the commencement of the second paragraph. Sect. 29 is the only section in the Act under the head "Evidence." The first part of the section permits any magistrate to take for the purposes of the Act depositions in the absence of the person accused. The second part of the section deals with the admissibility in evidence before the committing magistrate of depositions, etc., taken by others, whether in the presence or absence of the accused, when they are duly authenticated, and it is obviously sufficiently wide in its terms to include the depositions in the present case. I do not think that we are called on to decide the broad, and, perhaps, difficult, question discussed at the Bar, namely, whether the second paragraph of the section authorizes the reception in evidence in proceedings under the Act of depositions taken anywhere, at any time, in any proceedings, civil or criminal, to which the accused might have been a stranger.

It is to be observed that by s. 39 of the Act "deposition" includes "any affidavit, affirmation, or statement made "upon oath." The depositions in this case were taken in proceedings with which the accused was closely connected and concerned and to which he was as much a party as is consistent with his being at the same time a fugitive from India. But for that fact, the depositions would have been taken in his presence. The language of the second paragraph of s. 29 is obviously taken direct from the corresponding provision in s. 14 of the Extradition Act, 1870, with the exception of the words "whether taken in the absence of the "fugitive or otherwise," and we were referred to *In re Counhaye* (1), in which Blackburn J. in the course of his judgment observed: "We are, I believe, also all agreed that s. 14 makes "depositions properly authenticated evidence in proceedings "under the Act, whether they are taken in the particular "charge or not and whether taken in the presence of the "person charged or not." It is true that in the Extradition Act there is not to be found any provision corresponding to the first part of s. 29 of the later Act, but, so far as it is applicable, the decision does, I think, support the contention of the prosecution as to the admissibility of these depositions. In my opinion, they were not rendered inadmissible by reason of the fact that they were not taken "for the purposes of this "Act" and the point fails.

The remaining reasons urged for the exclusion of the depositions were stated as follows: First, they were bad for misjoinder of persons and charges, and, secondly, they were inadmissible because in some cases only parts of the depositions were forwarded from India and because some of them contained references to exhibits, of which neither the originals nor copies were available at Bow Street. These contentions appear to me to lose sight of the fact that the magistrate at Bow Street was not concerned with the regularity or otherwise of the trial in India, nor did he complain of the inadequacy of the material placed before him. If there was sufficient relevant evidence before him to raise the presumption referred to in s. 5, that is all that is required. Since, as we were informed, more than two hundred witnesses were examined in India and over two thousand exhibits were referred to in the depositions, it is not surprising that a selection had to be made for the purpose of the proceedings at Bow Street police court. As has already been stated, the depositions will not be admissible against the applicant if ever he takes his trial in India and there is no suggestion in this case that material evidence helpful to the accused has been suppressed or that the remainder of the depositions were omitted to be sent over for any other reason than that they were irrelevant to the case against the applicant. In my judgment, therefore, the depositions were properly admitted in evidence by the learned magistrate.

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(1) (1873) L. R. 8 Q. B. 410.

I think that the order of the magistrate was rightly made and in my judgment this application for a writ of habeas corpus should be refused.

SINGLETON and TUCKER JJ. concurred, delivering no separate judgments on the point on which the case is reported (1).

Application refused.

Solicitors for the applicant: *Warren & Warren.*

Solicitors for the respondents: *The Solicitor, India Office; the Director of Public Prosecutions.*

F. P. F.

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(1) After the judgments had been delivered in this case, Humphreys J. said: Before the court parts with this case, there is a short observation which the other members of the court desire me to make and with which I agree. It was brought to the attention of the court that, on the hearing at Bow Street police court, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. We think it right to point out that this is irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as counsel and witness in the same case.

C. A.

K. B. D.

1941

Mar. 6, 7, 11, 12.

C. A.

July 2, 3.

HICHENS, HARRISON, WOOLSTON AND COMPANY *v.* JACKSON AND SONS.

Principal and agent—Solicitor—Instruction to brokers to sell shares—Blank transfer signed by third party as transferor—Objection by transferor to registration of transfer—Purchase by broker of other stock to implement bargain—Liability of solicitor to indemnify brokers.

The defendants, a firm of solicitors, obtained judgment in the High Court on behalf of one E. against Mrs. L. The judgment being unsatisfied certain furniture, the property of Mrs. L., was seized under a fi. fa. To avoid the sale of her mother's furniture, Miss L. offered to give the defendants, in satisfaction of E.'s judgment, her ordinary stock in the B. waterworks company. She deposited with the defendants the certificate and a blank transfer signed by her. The defendants sent the certificate and blank transfer to the plaintiffs, who were stockbrokers and members of the London Stock Exchange. The defendants were well known to the plaintiffs as solicitors on whose behalf they had carried out a number of previous stock exchange transactions. Finding that the market for the shares was better in B. the plaintiffs sold them on the B. exchange to members of that exchange who were not members of the London Stock Exchange, and who dealt, not as jobbers, but as brokers on behalf of a purchaser. The proceeds of sale were remitted by the plaintiffs to the defendants, who paid E. his judgment debt and costs, and tendered the balance to Miss L. She refused to accept it, and objected to the registration of the transfer by the company, alleging, that, though her signature was genuine, it had been obtained by fraud and compulsion. [No allegation of fraud was made in the present action.] Ultimately, the plaintiffs purchased other stock to implement their bargain with the transferee, and brought this action, claiming indemnity from the defendants :—

Held, by the Court of Appeal (MacKinnon and du Parcq L.JJ. and Bennett J.), (1.) that the defendants, in giving instructions to the plaintiffs to sell the stock, did so as principals and not as agents ; but (2.) that the defendants had fulfilled their entire duty by providing the purchaser with a genuine certificate and a genuine transfer of the stock and were under no liability to indemnify the plaintiffs.

Stray v. *Russell* (1859) 1 E. & E. 888 ; *London Founders Association, Ld. and Palmer* v. *Clarke* (1888) 20 Q. B. D. 576 ; and *Skinner* v. *City of London Marine Insurance Corporation* (1885) 14 Q. B. D. 882 applied.

Smith v. *Reynolds* (1892) 8 Times L. R. 391 distinguished.

Decision of Viscount Caldecote C.J. reversed on the second point.

ACTION tried by Viscount Caldecote C.J. in the Commercial List.

The plaintiffs, Hichens, Harrison, Woolston & Co., were stockbrokers and members of the London Stock Exchange. The defendants, Jackson & Sons, were solicitors practising at Ringwood, Hants, for whom the plaintiffs had carried out a number of stock exchange transactions before that in question in this case.

The defendants obtained judgment in the High Court on behalf of a client named Etchells in an action brought by him against a Mrs. Lucas. The judgment was unsatisfied, and some furniture belonging to Mrs. Lucas was seized by the sheriff. Before it was sold Miss Elizabeth Ann Lucas, Mrs. Lucas's daughter, wrote to the defendants offering 250*l.* Consolidated Ordinary Stock in the Bristol Waterworks Company, out of the proceeds of which Etchells' judgment debt and costs could be satisfied. She gave the defendants the stock certificate and a blank transfer signed by her. This certificate and blank transfer were sent by the defendants to the plaintiffs, with instructions to sell the stock.

There was a better market for the stock of the Bristol Waterworks Co. in Bristol than in London, and the plaintiffs therefore sold the stock on the Bristol Stock Exchange to Messrs. Evans & Co., members of that exchange, but not of the London Stock Exchange. They bought, not as jobbers, but as brokers for a specific transferee. The proceeds of sale were sent to the defendants with a sold note which ran: "Sold on account of Miss E. A. Lucas," and in which it was stated that the commission was being shared by the plaintiffs with the defendants. The covering letter from the plaintiffs was headed "Account of Miss E. A. Lucas."

The defendants paid thereout Etchells' judgment debt and costs, and sent a cheque for the balance to Miss Lucas. She refused to accept it, and wrote to the Bristol Waterworks Co. objecting to the registration of the transfer, and alleging that her signature to it, though genuine, had been obtained by fraud and compulsion. [No issue of fraud was involved in the present action.] She persisted in her objection, and at length the plaintiffs bought other stock in the market to implement their bargain. They claimed in this action to be indemnified by the defendants, on the ground that they impliedly guaranteed that they had a good title to the shares and could procure the registration of the purchaser. They said that they (the plaintiffs) were bound by the rules of the London Stock Exchange to provide a "clean" transfer which the transferee could register, and were, therefore, compellable to purchase other stock to implement their bargain, and were entitled to an indemnity from the defendants for the costs incurred in so doing.

The defendants denied liability on the ground that to the plaintiffs' knowledge they were solicitors acting as agents not as principals, and that the name of the owner of the shares was known to the plaintiffs from the certificate and blank transfer. They said that the transfer was a valid and genuine document when handed by them to the plaintiffs, and that they were not responsible for the subsequent repudiation by Miss Lucas.

Havers K.C. and *H. G. Robertson* for the plaintiffs. There is no case exactly covering this state of affairs, but it is submitted that where a principal gives a mandate to an agent, and in the execution of that mandate the agent, without default on his part, suffers loss, the principal is bound to indemnify the agent. As between the plaintiffs and defendants the plaintiffs were agents, and entitled to look to the defendants for indemnity: see Halsbury's Laws of England, Hailsham ed., vol. i., p. 256, s. 431; p. 263, s. 437. He referred to *Smith* v. *Reynolds* (1) and (inter alia) to r. 120, sub-r. 1, of the London Stock Exchange rules, which makes the seller of securities responsible for the genuineness and regularity of all documents delivered.

The obligation was on the defendants not only to do nothing themselves to prevent the registration of the purchaser, but to see that Miss Lucas did nothing to prevent registration. This position may arise in any case where shares are deposited for security.

(1) (1892) 8 Times L. R. 391; affd. in H. L. (1893) 9 Times L. R. 494.

Ivan Horniman for the defendants. It is contended that the defendants acted throughout as agents, and did not contract personally. It is immaterial who their principal was, though, in fact, the plaintiffs knew who was the actual seller. They did not treat the defendants as principals, otherwise they would have been breaking r. 199 of the Stock Exchange rules, which prohibits any sharing of commission with a principal, but the contract note here showed on the face of it that commission was shared between the plaintiffs and the defendants. Prima facie when a certificate and transfer are received by brokers they assume that the person whose name appears on the documents is the transferor. "A person who knows "that the legal estate in land or in shares, or in any other "property, is vested in A. B., cannot safely assume that the "whole equity is in C. D. without making an inquiry of A. B." (Per Fry J. in *Pearson* v. *Scott* (1)). So in this case the plaintiffs were put on inquiry. In the contract note they correctly named Miss Lucas as the principal and Jackson & Sons as the agents with whom the commission was to be shared.

Secondly, even if the defendants did act as principals they are under no duty to indemnify the plaintiffs in respect of a voluntary payment by them as distinct from money paid by them under a legal obligation. There was no liability on the plaintiffs to replace the shares, and, therefore, no duty on the defendants to indemnify them.

Thirdly, there was, in fact, good delivery of the shares. The defendants, having delivered documents genuine and regular when they delivered them, cannot be responsible for the subsequent act of Miss Lucas, who was not their client, nor in any way subject to their control. Otherwise no creditor could safely act on a blank transfer signed by his debtor. Miss Lucas's subsequent act might give rise to a cause of action, but did not make the delivery bad. In *London Founders Association, Ld., and Palmer* v. *Clarke* (2) it was held that a contract for a sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transferee: see also observations of

(1) (1878) 9 Ch. D. 198, 203. (2) (1888) 20 Q. B. D. 576.

Brett M.R. in *Skinner v. City of London Marine Insurance Corporation* (1); Schwabe & Branson's Law of the Stock Exchange, 2nd ed., p. 178; Halsbury's Laws of England, Hailsham ed., vol. xxxi., p. 620, s. 893. As to the duty of a company to register see Palmer's Company Precedents, 15th ed., Part I., pp. 602, 603. The transferee, in the present case, could have sought as his remedy to force the Bristol Waterworks Co. to put his name on the register.

[Viscount Caldecote C.J. Is not your difficulty that the plaintiffs do not control the transferee who might refuse to embark upon litigation ?]

The transferee had alternative remedies against the persons liable to him. The contract, in the circumstances of this case, was between Miss Lucas and the transferee. The plaintiffs and Messrs. Evans & Co. acted merely as agents to bring the principals together and a party to the contract cannot sue an agent for breaches of the contract. In order to succeed, the plaintiffs must show that they were under an obligation to Evans & Co. to replace the stock. Such an obligation could only arise under the rules of the London Stock Exchange, but this bargain was made on the Bristol Stock Exchange. The basis of *Smith* v. *Reynolds* (2) was that under the rules of the London Stock Exchange a broker made himself liable to another broker as principal. Here both brokers acted as agents, and, the bargain being concluded, they drop out leaving the principals to their remedies against each other if the contract is broken.

Havers K.C. in reply. The conduct and duty of a broker are always subject to the rules of the London Stock Exchange. The plaintiffs' case is that the defendants as principals instructed them to sell this stock. Finding it would be to their principals' benefit to do so, they sold to a non-member. The plaintiffs found themselves unable to make good delivery of the stock, because of Miss Lucas's act. They say they were bound to purchase other stock—and would clearly have been required by the Committee to do so if the matter had been

(1) (1885) 14 Q. B. D. 882, 887.
(2) 8 Times L. R. 391; affirmed in H. L. 9 Times L. R. 494.

made the subject of a formal submission. They were entitled to purchase the stock without waiting for formal steps to be taken to compel them, and the defendants are bound to indemnify them.

VISCOUNT CALDECOTE C.J. The plaintiffs in this case are stockbrokers and members of the London Stock Exchange. The defendants are a firm of solicitors who practise at Ringwood and they had a client, a Mr. Etchells—who had a judgment against a Mrs. Lucas. They were about to levy execution when Miss Lucas offered and gave the defendants a certificate for 250*l*. Consolidated Ordinary Stock, which was in her name, of the Bristol Waterworks Company, the intention being, as was expressed in a letter written by her to the defendants, that the stock should be sold, the execution provided for in full, and the balance of the proceeds of sale returned to her. The defendants thereupon instructed the plaintiffs to sell. Their instructions to the plaintiffs were contained in a letter signed by the defendant firm. The letter enclosed the certificate for the stock—together with a blank transfer executed by Miss Lucas; the defendants asked the plaintiffs to realize the stock for the best price obtainable and to let them have a cheque in due course.

The first question that arises is whether the defendants, when they instructed the plaintiffs to sell, acted as principals, or as agents for an undisclosed principal, or perhaps as agents for the legal owner of the stock who had executed the blank transfer, namely, Miss Lucas.

Three matters have been relied upon in support of the contention that the defendants gave those instructions to the plaintiffs only as agents and not as principals. First of all it was pointed out that the defendants were described on their notepaper as solicitors. Secondly, it was pointed out that in the sold note which was in due course sent by the plaintiffs to the defendants the name of Miss E. A. Lucas appeared, and the letter in which the plaintiffs enclosed the contract note for the sale of the stock is headed "Account "Miss E. A. Lucas." Further it was said that the statement appearing on the contract note that the plaintiffs' commission was divisible with Messrs. Jackson the defendants, shows that Messrs. Jackson were treated as agents, because it is contrary to the rules of the London Stock Exchange for a broker who is a member of the Exchange to share commission with a principal.

As to the first ground, that Messrs. Jackson were solicitors, solicitors constantly make themselves personally liable in matters which are really and primarily the concern and business of their clients. If they please they can make it plain that they are not contracting personally or undertaking any personal responsibility; but the mere fact that Messrs. Jackson were known to be solicitors and were so described on their notepaper in this case seems to me to lead to no conclusion one way or the other.

As to the second matter relied upon, that the name of Miss Lucas appears on the contract note and at the head of the letter enclosing the contract note, I think that this is an indication merely of the item in the plaintiffs' books; it was to identify the account; and I accept the plaintiffs' explanation—which seems to me inherently probable—that the purpose of the appearance of the name was what I have said. It is to be observed, moreover, that the name does not appear in the defendants' letter in which they gave the instructions to the plaintiffs; it only appears in the signature which was upon the blank transfer. I further observe that Miss Lucas was not the defendants' client, and it could hardly be said at that stage that the mere identification of the item by the fact that Miss Lucas was the transferor is any reason for saying that they were writing the letter as her agent.

As to the third ground I am willing to assume that the plaintiffs would not break the rule of the London Stock Exchange; but if the solicitors were, as no doubt they were, primarily agents—that is solicitors for Mr. Etchells—there seems to me to be nothing in the rules of the London Stock Exchange to prevent them drawing their commission even though they were contracting personally. But in any case this matter seems to me incapable of throwing any real light

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upon the capacity in which the defendants contracted because although I think it is very unlikely that the plaintiffs would have broken the Stock Exchange rules, any indications which this matter gives seem to me to be quite inconclusive. All three of these grounds amount in my judgment to nothing on the question whether the defendants contracted personally or as agents.

On the other hand there are many indications which I think are of weight to lead to the contrary view. The plaintiffs had never heard of Mr. Etchells, who was the defendants' client. They knew nothing about Miss Lucas except that her name appeared upon the transfer. They would be very unlikely, I think, to deal with an unknown principal or to take instructions from someone who was to them nothing more than a name upon a blank transfer. They would incur risks which it would be difficult for them to guard against, and as to which they would have nobody to fall back upon except someone as to whose existence they knew nothing, apart from the bare name on the transfer.

One further matter is of importance. The letter of instructions is signed by the defendant firm without qualification and there is nothing whatever in the letter to displace the inference which I think is the right one, that the defendants were giving their instructions to the plaintiff stockbrokers personally and not as agents.

Mr. Horniman relied upon two decisions as supporting his contention. The first of them was *Wakefield* v. *Duckworth* (1). That was a case in which solicitors were held by the county court judge not to be liable to pay for photographs which they had ordered orally for the purpose of some litigation in which their client was engaged. The Divisional Court did not interfere with the decision of the county court judge, but on the facts of that case the decision was one which, in my view, throws no light at all upon the very different circumstances of the present case.

The other case to which I was referred was *Pearson* v. *Scott* (2) and that case does contain one passage which perhaps at first

(1) [1915] 1 K. B. 218.

(2) 9 Ch. D. 198.

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sight might appear to be authority for the view that where stockbrokers are dealing with a solicitor who sends a transfer bearing the names of other persons for the sale of a security, the solicitor cannot be heard to say that he was contracting in any other character than as agent for the persons whose names appear. But in the view that I take of this case it is not an authority on the question of principal and agent. It decides that if a broker is employed to sell securities in the name of someone other than his client he is put upon inquiry as to their interests, and payment to the client will not discharge him. I note that in *Pearson* v. *Scott* (1) the client had absconded and the owner's only remedy, therefore, was to look to the broker. That case, as I have said, is not authority for a proposition which assists the defendants' contention on this part of the case.

I therefore come to the conclusion that the defendants must be deemed here to have contracted personally; no contrary intention appears from any of the circumstances, still less from the letter in which they gave instructions, and I hold therefore that the defendants gave their instructions as principals.

That brings me to the more difficult question involved in the plaintiffs' second submission, namely, whether the plaintiffs were obliged or compellable to provide other stock in the following circumstances. The stock as I have said was sold. It was sold through or to a firm of stockbrokers who were members not of the London Stock Exchange but of the Bristol Stock Exchange, Messrs. Evans, and Messrs. Evans sold to a firm of accountants who were in fact acting on behalf of Mr. Fry. Mr. Fry paid the purchase price and the money eventually was paid by the plaintiffs, after deduction of their own commission, to the defendant firm who paid out Mr. Etchells and sent a cheque for the balance to Miss Lucas. Miss Lucas preferred not to take the cheque and I understand the money is still in the hands of the defendant firm. But Miss Lucas did not stop there. She adopted an attitude which may or may not have been altogether her own—it

(1) 9 Ch. D. 198.

may have been instigated by Mrs. Lucas—but having, first of all, asked the Bristol Waterworks Company to hold up the sale of her shares until they heard from her solicitor, a few days later she said there was nothing for her to do but to ask the Company to return the scrip of her shares to her personally, and finally she repudiated her signature to this extent, that although she admitted the signature on the transfer deed was authentic she said it was obtained under fraud and compulsion.

In those circumstances the Bristol Waterworks Company had either to act upon the transfer and run the risk of some proceedings by Miss Lucas or they had to take the precaution of not registering the stock in the buyer's name until Miss Lucas's position was cleared up. In fact they took the latter course, with the result that although the purchaser, Mr. Fry, had paid for the stock he got nothing by it and his position was, no doubt, as Mr. Horniman suggested, that if he wanted to get registered he must initiate legal proceedings. Mr. Horniman submitted (and I think rightly submitted) that Mr. Fry might have taken appropriate steps under the provisions of the Companies Act to have his name put upon the register; but there was no reason why he should take this course if by the ordinary operation of the rules of the London Stock Exchange the brokers responsible could be made to produce clean transfers, that is to say, transfers which the company could accept and register without any question arising.

The question is, was there any other remedy, or was the plaintiff firm under any obligation to produce transfers which, to use Mr. Havers's expression, were clean transfers? It is said by counsel on behalf of the plaintiffs that the brokers, Messrs. Evans, were in a position to compel the plaintiffs to deliver other stock because the plaintiffs and Messrs. Evans contracted under the rules of the London Stock Exchange. First of all, I think they did so contract. The plaintiffs' sold note in my opinion represents the real transaction. The defendants went to the plaintiffs knowing that they would sell subject to the rules and regulations of the London Stock Exchange; and even though the plaintiffs sold not on the

London Stock Exchange but on the Bristol Stock Exchange, where they could get a better price, the transaction was subject to the rules and regulations of the London Stock Exchange.

As I understand, it was conceded by counsel on behalf of the defendants that if this had been a transaction between the plaintiffs and a jobber subject to the rules of the London Stock Exchange, the plaintiffs would have been liable to replace the stock; but whether that concession is made or not that is how I view the position. By r. 120 of the rules of the London Stock Exchange, under which, as I have said, the transaction was carried out, the seller of securities is responsible for the genuineness and regularity of all documents delivered.

At this point I think it is convenient to look at the authorities to which both sides have referred. The first of them is *London Founders Association, Ld., and Palmer* v. *Clarke* (1). The plaintiffs in that case had bought shares in a company whose articles had a provision entitling the directors to exercise a discretion as to the registration of transferees. The Court in that case held that a vendor of shares on the London Stock Exchange does not guarantee that the shares will be registered in the names of purchasers; and Lord Esher M.R. says this (2): "I do not think that "the vendor does undertake that the company will accept "the purchaser so as to make himself responsible for their "refusal to do so. The purchaser takes that risk on himself, "and the seller's liability is satisfied by handing to the "purchaser the transfer and certificates of the shares in "proper form, and doing nothing either before or subsequently "to prevent the registration of the purchaser."

In *Skinner* v. *City of London Marine Insurance Corporation* (3) Sir William Brett M.R., as he then was, similarly dealt with the position of a seller on a bargain and sale of registered shares of a company. He says (4): "It seems to me "that the only contract in such a case is that the seller shall

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(1) 20 Q. B. D. 576.
(2) Ibid. 582.
(3) 14 Q. B. D. 882.
(4) Ibid. 887.

"execute a valid transfer of the shares and hand the same "over to the transferee, and so do all that is necessary to "enable the transferee to insist with the company on his "right to be registered a member in respect of such shares."

Lastly, in *Smith* v. *Reynolds* (1), in the Court of Appeal, the Court was dealing with r. 92, which is now r. 120. Rule 92 provided that " The seller of shares or stock is responsible for "the genuineness and regularity of all documents delivered, and "for such dividends as may be received," and so on. Lord Esher M.R. said this: "The defendant chose to sell shares "through a broker on the Stock Exchange. The Stock "Exchange was a market, and had certain rules. Therefore, "any one instructing a broker to buy or sell shares on the Stock "Exchange was liable to indemnify the broker for any liability "incurred by him in carrying out his instructions by reason "of the rules of the Stock Exchange, so long as those rules "were reasonable. That principle applied to all markets." The Court came to the conclusion that r. 92 was a reasonable rule and that therefore the reliance which was placed upon it was proper. That judgment of the Court of Appeal was approved in the House of Lords (2).

It will be noticed that different words have been used—"proper," "valid," "regular"—and it seems to me that they all amount to the same thing. Here the obligation on the part of the sellers who, as I have said, were the defendants, was to produce regular or valid or proper transfers besides providing the certificate or having the transfer certificated, and to do nothing to interfere with or prevent the registration of the stock in the name of the transferee. There being no question here as to the reasonableness of the rule—there could be no question in the light of the decision in *Smith* v. *Reynolds* (1)—in my judgment the defendant firm is liable on the principle which was stated by the Master of the Rolls in the case of *Smith* v. *Reynolds* (1) to which I have just referred.

There is no question as to what that principle is. It is that an agent who, in the course of the execution by him of his authority, incurs losses and liabilities is entitled to be reimbursed by the person for whom he acts. The principle is stated in Bowstead on Agency, 9th ed., arts. 70 and 71. No question has been raised as to the application or correctness of the rule as there stated. The point which has been taken is that the plaintiffs were not compellable to replace the stock which could not be registered in the name of the transferee with other stock which could be, and that therefore the principle does not apply.

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(1) 8 Times L. R. 391, 392. (2) 9 Times L. R. 494.

There is only one further matter to be dealt with and I can dispose of it briefly. Mr. Horniman made the submission that Messrs. Evans, the Bristol stockbrokers, having brought the buyer, namely, Mr. Fry, and the sellers together, dropped out and that the parties must then enforce their remedies against each other. But that seems to me not to be the position. Whatever may be the position of an agent in a sale of land which Mr. Horniman used as an illustration, Messrs. Evans's position was secured by their contract made in pursuance of and under the rules and regulations of the London Stock Exchange. They were entitled in my judgment to call upon the plaintiffs to produce stock which could be registered in the name of the buyer and in those circumstances, having regard to the principle which I have stated, the plaintiffs are entitled to be indemnified by the defendants in respect of the liability which they have incurred to Messrs. Evans.

In my view the plaintiffs' case has been made out and there must be judgment against the defendants.

Judgment for plaintiffs.

J. W. H.

The defendants appealed.

C. A.

A. T. Miller K.C. and *Horniman* for the defendants substantially repeated the arguments advanced before the Lord Chief Justice and said that the mistake had been made of assuming that the British Waterworks Company was a limited company under the Companies Acts. The company was registered under a special Act, but the transferee of Mrs. Lucas's stock could have enforced registration of the transfer either "by prerogative writ or by action of mandamus" against the company: Halsbury's Laws of England, 2nd ed., vol. v., p. 40; *Reg.* v. *Carnatic Ry. Co.* (1); and *Reg.* v. *Shropshire Union Co.* (2). The company should have registered the transfer subject to giving Miss Lucas time to bring proceedings to establish her claim: see Palmer's Company Precedents, 15th ed., p. 602. The plaintiffs had perfected their obligations when they tendered the certificate of the stock and a duly signed transfer.

Havers K.C. and *H. G. Robertson* for the plaintiffs substantially repeated their argument before the Lord Chief Justice.

MACKINNON L.J. [after stating the facts:] The whole basis of this claim rests on the allegation that it was the duty of the defendants, not merely to hand over a transfer valid in form with a certificate for the stock, but also to secure or guarantee that that transfer would be eventually registered by the company in the name of the purchaser. In my view, however, that contention is contrary to the law as laid down uniformly by a series of cases which began as long ago as 1859. In that year, in *Stray* v. *Russell* (3), the facts of which were rather special and I need not refer to them, Lord Campbell C.J., in his judgment said (4): "What "does the vendor [of shares] contract to sell and deliver? "Genuine transfers and certificates, with the interest and "rights which they convey. There might be a condition "subsequent, imposing upon the vendor the onus of procuring "the consent of the directors to the transfer; but I can find "no evidence of such a condition." Then he develops that and decides that there was no breach of contract by the vendors who had handed over, as the defendants handed over in this case, a genuine transfer and a genuine certificate. That was followed in 1885, in *Skinner* v. *City of London Marine Insurance Corporation* (5). There, again, the purchaser of

(1) (1873) L. R. 8 Q. B. 299.
(2) L. R. 8 Q. B. 420.
(3) (1859) 1 E. & E. 888.
(4) 1 E. & E. 888, 901.
(5) 14 Q. B. D. 882.

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shares complained that he had failed to become registered by the company under a transfer of shares handed to him by the vendor. Brett M.R. stated the principle thus (1): "That, therefore, raises the question what is the ordinary "contract by the seller on a bargain and sale of registered "shares of a company. It seems to me that the only contract "in such a case is that the seller shall execute a valid transfer "of the shares and hand the same over to the transferee and "so do all that is necessary to enable the transferee to insist "with the company on his right to be registered a member in "respect of such shares." That is in accordance with what was laid down by Lord Cairns in *Ward and Henry's* case (2). Yet again, in *London Founders Association, Ld., and Palmer* v. *Clarke* (3), the same point arose. Lord Esher M.R. cites the previous cases, including *Stray* v. *Russell* (4), and says (5): "The purchaser . . . . might have a remedy against the "company, but I do not think that the vendor does undertake "that the company will accept the purchaser so as to make "himself responsible for their refusal to do so. The purchaser "takes that risk on himself, and the seller's liability is satisfied "by handing to the purchaser the transfer and certificates of "the shares in proper form, and doing nothing either before "or subsequently to prevent the registration of the purchaser."

There is all that concurrent authority as regards the common law duties of the vendor and purchaser of shares. The defendants relied on r. 120, sub-r. 1, of the Stock Exchange Rules, which provides: "The seller of securities is responsible "for the genuineness and regularity of all documents "delivered." Assuming, although I need not decide the point, that that sub-rule applies in this case, I think that it adds nothing to the position. Its effect is merely, as was said by the judges, when dealing with the common law, that the vendor must hand over a genuine certificate and a genuine and valid transfer. It does not add anything in the way of obligation on the vendor to procure that the company shall register the transfer when it is handed over.

(1) 14 Q. B. D. 882, 887.
(2) (1867) L. R. 2 Ch. 431.
(3) 20 Q. B. D. 576.
(4) 1 E. & E. 888.
(5) 20 Q. B. D. 582.

The authorities seem to me to show clearly that there was no duty on the defendants under which they in any way guaranteed that the transfer should be registered by the company. That, as Lord Esher said, was a risk that the purchaser took on himself.

It has been pointed out to us that there was a very simple remedy—this does not happen to be a company within the Companies Acts, in which there is even more simple machinery—open to the purchaser of the stock, namely, to apply under Order LIII., for mandamus against Miss Lucas. There could have been no defence to the application and the purchaser would have secured his registration as proprietor of the stock and would undoubtedly have recovered his costs against Miss Lucas.

The Lord Chief Justice, in his judgment, cites more than one of the passages in the authorities which I have read. He refers to a passage in *London Founders Association, Ld., and Palmer* v. *Clarke* (1) and he also quotes the extremely apposite words of Brett M.R. in *Skinner* v. *City of London Marine Insurance Corporation* (2), both of which extracts I have read. Having cited those two cases, which seem to me to lay down the legal position with absolute clearness, he refers to *Smith* v. *Reynolds* (3), which seems to me to have very little bearing on the matter, except that it apparently established that the rules of the London Stock Exchange were reasonable and could be properly imported into transactions carried out on the Stock Exchange. He concludes by saying: "In my judgment the defendant "firm is liable on the principle which was stated by the Master "of the Rolls in the case of *Smith* v. *Reynolds* (3)." I can only understand that as meaning that r. 120 would justify the plaintiffs in purchasing this stock against the defendants and demanding repayment of its price and that that rule was in *Smith* v. *Reynolds* (3) held to be a reasonable rule. I do not follow that reasoning. The true principle of law involved in this case is, in my judgment, that laid down in the passages

(1) 20 Q. B. D. 582.
(2) 14 Q. B. D. 887.
(3) 8 Times L. R. 391.

which I have cited and which seem to me to show conclusively that there was no such duty cast on the defendants as that which is suggested as the basis of the claim against them.

In the result, I think that this appeal succeeds, that the judgment must be set aside, and there must be judgment for the defendants with costs.

DU PARCQ L.J. I agree, and, as we are differing from the conclusion reached by the Lord Chief Justice, I will add a few words.

It is clear that the defendants performed their duty when they handed over to the plaintiffs, acting for the transferee, a duly executed transfer together with the certificate. They were under no duty to procure the registration of the transfer and it is not contended that they were. As is said in the passage in Palmer's Company Law, 16th ed., p. 118, to which we were referred, if the buyer wishes to protect himself, he must see that registration is guaranteed. No doubt, a seller of stock or shares is always under a duty to do nothing to prevent the registration of the purchaser. Where it is necessary that a seller should do certain things or execute certain documents in order that delivery may be completed, a term must plainly be implied in the contract that he will not do anything tending to nullify those acts or documents, but, in my opinion, it is neither necessary nor possible, where the seller is not himself the transferor, to imply any warranty such as that pleaded in the statement of claim, namely, that the transferor will do nothing to prevent the transfer of the stock. Mr. Havers was unable to find any authority to support that plea, and I think that the proposition involved in it is not only unsupported by authority but is also wrong in principle. It cannot be said that such an implied warranty must be read into the contract to give it business efficacy. On the contrary, the attempt to import such a term can only increase the difficulties of business men. On those short grounds, I agree that the appeal must succeed.

BENNETT J. I also agree. I respectfully agree with the conclusion of the Lord Chief Justice that in the transaction which is being investigated the defendants were acting as principals and not as agents. It seems to me that on the documents that conclusion was abundantly justified. On that footing, as it seems to me, the defendants as principals instructed the plaintiffs as their agents to find a purchaser for some stock. The plaintiffs found a purchaser of the stock and thereupon the defendants had to perform certain duties in connection with the transaction. It is alleged in the statement of claim that the duty of the defendants was to take all necessary steps to procure the registration of the transfer of the stock. Mr. Havers, on behalf of the plaintiffs, did not put the duty as high as that, but he submitted that the duty under which the defendants came in the circumstances was, as regards Miss Lucas, to see that she did nothing to prevent or interfere with the registration of the transfer. No authority was cited by Mr. Havers in support of that proposition, and indubitably it is an extension of the principle laid down in the authorities to which my Lord has referred and stated in Palmer's Company Law, 16th ed., p. 118, where the duty is said to be to hand over to the transferee a duly executed transfer together with the certificate or its equivalent. Unless there is support for the extension of the proposition for which Mr. Havers contended, there is, in my view, no foundation for the plaintiffs' action. For these reasons, I agree with my Lord and du Parcq L.J. that the appeal should be allowed.

MacKinnon L.J. I agree that the defendants were acting as principals and not as agents, but it did not occur to me as necessary to say so.

Appeal allowed.

Solicitors for defendants: *Hair & Co.*
Solicitors for plaintiffs: *Roney & Co.*

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June 19, 20.

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Revenue—Income tax—Super-tax—Avoidance of payment—Company—Withholding from distribution of income—Exemption of company in which " public . . . . substantially interested "—Member of public—Gift of shares—Quotation of shares in stock exchange " official list "—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31, *sub-s.* 3.

Companies in which the public are " substantially interested " are exempt from certain provisions of s. 21 of the Finance Act, 1922, designed to prevent the avoidance of the payment of super-tax through the withholding from distribution to its members of income of a company. Such a company is one in which shares carrying not less than 25 per cent. of the voting power " have " been allotted unconditionally to, or acquired unconditionally " by, and . . . . beneficially held by, the public . . . . and " . . . . have . . . . been the subject of dealings on a stock " exchange . . . . and . . . . have been quoted in the official list " of such a stock exchange." Part of the necessary 25 per cent. of the shares of a company was held by a niece of the principal shareholder who had given the majority of those shares to her :—

Held, that she was a member of the public.

The shares had not been quoted among the official quotations of the C. stock exchange, but they had been the subject of dealings thereon some time before the year of assessment and had then been mentioned in the list of other business done (published by the exchange). The daily list published by the exchange contained in one main list both the official quotations and the list of other business done.

Held, that the shares had been " quoted in the official list " within the meaning of the section.

Judgment of Lawrence J. affirmed.

APPEAL from the judgment of Lawrence J. on a case stated by Special Commissioners of Income Tax.

The appellant company, the Tatem Steam Navigation Co., Ld., was a company under the control of not more than five persons within the meaning of s. 21, sub-s. 6 (*d*), of the Finance Act, 1922 (1). The largest shareholder was Lord Glanely, but, apart

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(1) Finance Act, 1922, s. 21 : " With a view to preventing the " avoidance of the payment of " super-tax through the with- " holding from distribution of " income of a company which " would otherwise be distributed, " it is hereby enacted as follows : " (1.) Where it appears to the " special commissioners that any " company to which this section " applies has not . . . . distributed

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from the five shareholders who controlled the company, there were some 310 other shareholders who together held more than 25 per cent. of the voting power of the company. Among these was a Mrs. Blyth, Lord Glanely's niece, who, at the material time, held some 22,100 shares, 16,000 of which had been transferred to her as a gift by Lord Glanely in March, 1928, being settled on her on the terms of her marriage settlement. Mrs. Blyth had previously purchased 4000 of the shares and in 1936 she bought a further 2100 from her mother, those shares being added to the 20,000 already comprised in the marriage settlement.

The question was whether the company was one in which the public was "substantially interested" within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927 (1), i.e., a company in which

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"to its members in such manner "as to render the amount distributed liable to be included "in the statements to be made by "the members of the company of "their total income for the purposes of super-tax, a reasonable "part of its actual income from "all sources . . . . the commissioners may, by notice in "writing to the company, direct "that for purposes of assessment "to super-tax, the said income "of the company shall, for the ". . . . period specified in the "notice, be deemed to be the "income of the members, and the "amount thereof shall be apportioned among the members."

Sub-s. 6 (as amended by s. 31, sub-s. 3, of the Finance Act, 1927): "This section shall apply "to any company which is under "the control of not more than "five persons and which is not a "subsidiary company or a company in which the public are "substantially interested . . . . "For the purpose of this subsection . . . . A company shall "be deemed to be a company in "which the public are substantially interested if shares of the "company . . . . carrying not less "than 25 per cent. of the voting "power have been allotted unconditionally to, or acquired "unconditionally by, and . . . . "beneficially held by, the public "(not including a company to "which the provisions of this "section apply) and any such "shares have in the course of "such . . . . period been the "subject of dealings on a stock "exchange in the United Kingdom "and the shares have been quoted "in the official list of such a stock "exchange." "A company shall "be deemed to be under the "control of any persons where the "majority of the voting power or "shares is in the hands of those "persons or relatives or nominees "of those persons. . . . ." "The "expression 'relative' means a "husband or wife, ancestor, or "lineal descendant, brother, or "sister."

(1) See note (1), ante p. 194.

shares carrying not less than 25 per cent. of the voting power had been allotted to the public unconditionally and had been quoted in the official list of a stock exchange in the United Kingdom, in which case, by sub-s. 6 of s. 21 of the Act of 1922, as amended, s. 21 of the Act of 1922 would not apply. This depended on whether Mrs. Blyth was a member of the public, 16,000 of her shares, forming part of the necessary 25 per cent., having been given to her and not purchased by her. The shares of the appellant company had admittedly been the subject of dealings on the Cardiff Stock Exchange, but some years before the year of assessment. They were not then quoted among the official quotations, but they were mentioned in the list of other business done, and the daily list of the Cardiff Stock Exchange contained both the official quotations and the list of other business done in one main list.

The commissioners held that the list was one official list, but they also held that Mrs. Blyth was not a member of the public for the purposes of the section ; that her shares were not part of the shares held by the public ; that, consequently, the company was not one in which the public was "substantially interested" ; and that, therefore, s. 21 of the Finance Act, 1922 (1), applied. The company appealed.

Tucker K.C. and *T. N. Donovan* for the appellants.
Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

LAWRENCE J. This is an appeal from a decision of the special commissioners, and the question is whether the appellant company is a company in which the public are "substantially "interested," and is, therefore, outside the provisions of s. 21 of the Finance Act, 1922, by virtue of s. 21, sub-s. 6, of that Act, as amended by s. 31, sub-s. 3, of the Finance Act, 1927 (1). That involves the decision whether the 25 per cent. of the shares in the appellant company which are held by the 310 shareholders, including Mrs. Blyth, constitutes a substantial interest in the company by the public within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended. [His Lordship stated the facts and read s. 21 of the Act of 1922, as amended, and continued :] Mr. Tucker, on behalf of the appellant company, pointed out that it was not necessary that the shares should have been quoted in the official list of a stock exchange for the year or years in question, and that in fact the shares with which we are concerned here had been quoted during 1914 and 1915 among the official quotations in the daily list of the Cardiff Stock Exchange. The Crown, first of all, assumes that they have got to be mentioned among the official quotations of securities in the year in question, and then contends that it is not sufficient that the shares have been mentioned in the list of the stock exchange if they were mentioned only in the list of other business done. The daily lists of both the Cardiff Stock Exchange and the London Stock Exchange contain a list of official quotations and also a list of other business done, but both are contained in the one main list, and both the witnesses who gave evidence before the special commissioners said that, in their opinion, the whole list was one official list, and that the " other business done " was equally a part of the official list of the stock exchange. In my opinion, the commissioners were right on this point, on the ground that it was not necessary for the shares to have been in the official list during the year in question and that the shares had been quoted in the official list of a stock exchange.

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(1) See note (1), ante p. 194.

On the other and more important point, it is contended for the Crown that Mrs. Blyth was not a member of the " public " within the sub-section because she was the niece of Lord Glanely, and because 16,000 of the shares were given to her and were not purchased by her. No suggestion is made that she acquired the shares conditionally. It was also said that the public are not contrasted in that section with the five persons under whose control ex hypothesi the company is. It is argued that, since the five persons may control the company by holding 51 per cent. of the shares, and the section refers to only a 25 per cent. holding on the part of the public, the contrast cannot be between the five persons and the public because that leaves 24 per cent. of the shares, so to speak, in

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the air. It seems to me that the view of the legislature may have been that the company would not be controlled by a mere 51 per cent. holding, but would be controlled only by a 75 per cent. holding, in which case the point would have no substance, but in any event it is not a point which induces me to hold that the word " public " must be read in any different sense from the ordinary meaning of the word. Some light is thrown on the meaning of the word by the section itself, which in a paraphrase says that it is not to include a company to which the provisions of the section apply, and, secondly, by the definition in s. 21, sub-s. 6, of the Act of 1922 of a company which is to be deemed to be under the control of five persons, namely, "A company shall be deemed to be "under the control of any persons where the majority of the "voting power or shares is in the hands of those persons or "relatives or nominees of those persons, or where the control is "by any other means whatever in the hands of those persons. "The expression ' relative ' means a husband or wife, ancestor, "or lineal descendant, brother, or sister." That section has been amended by s. 19, sub-s. 1, of the Finance Act, 1936, in more general terms, but in sub-s. 2 it is provided that persons who are relatives of one another, or persons who are nominees of other persons, shall be treated as single persons, and the expression " relative " in sub-s. 2 (*a*) contains the same definition. As the definition of the expression " relative " does not include a niece, these provisions indicate, in my opinion, that a niece is not deemed to be one of the five persons who control the company merely because she is a niece. The sole matter of importance is that the public should be " substantially interested " in the company by virtue of a shareholding in the company by members of the public which has been either allotted unconditionally to them or acquired unconditionally by them. In my opinion, Mrs. Blyth was a member of the public, and, as I have said, it is not suggested that the shares were acquired by her on any condition whatever.

The special commissioners expressed their judgment in these words : " In our opinion, it cannot be said that these "16,000 shares were allotted to or acquired by the public.

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"They were not purchased in the market or acquired in any "way for valuable consideration." Pausing there, I have already pointed out that there is no mention in the section of purchase in the market or acquirement for valuable consideration. The commissioners go on: "They were a personal gift "from Lord Glanely, who controlled the company, out of his "own private holding of shares, to his niece as an accretion to "her marriage settlement funds. Lord Glanely was one of the "trustees of this settlement." The only materiality of those observations appears to me to be as suggesting that the holding of Mrs. Blyth was not an unconditional holding and that is not suggested. On these facts, the commissioners say: "We find that this transaction was not an acquisition by or "allotment to the public." The commissioners appear to me to have omitted to consider the words which are crucial in this matter, namely, "allotted unconditionally to, or acquired "unconditionally by" in s. 21, sub-s. 6, of the Act of 1922 as amended. In my opinion, Mrs. Blyth was a member of the public and she did acquire these shares unconditionally. The public were, therefore, substantially interested in the appellant company, and the appeal will be allowed with costs.

The Commissioners of Inland Revenue appealed. The appeal was heard on June 19, 20, 1941.

Sir Donald Somervell A.-G. and *R. P. Hills* for the appellant. The question whether Mrs. Blyth was or was not a member of the public is one of fact, found by the commissioners, which finding cannot be disturbed. "Public" is used in its popular and business sense, which has the "all and sundry" element in it indicated by Eve J. in *Lynde* v. *Nash* (1), and in that sense would not include friends and relations, although they, of course, are members of the public. The legislature thought that members of the public in the business sense would be more likely to keep a vigilant eye on the conduct of a company than would friends and relations of the directors. If 51 per cent. of the shares are in the hands of the five persons mentioned in s. 31, sub-s. 3, of the Act of 1927 as being in

(1) [1928] 2 K. B. 93, 113.

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control the opening words of sub-s. 6 are satisfied, therefore a company is contemplated as being within s. 21, sub-s. 6, of the Act of 1922 (as amended) where 49 per cent. of the shares are held by persons other than the five. But those persons cannot be members of the public within the Act merely because they are other than the five. Otherwise every company in which five held over 50 but not 75 per cent. of the shares would be taken out of the operation of s. 21 of the Act of 1922. "Public" does not mean everybody except the five. If Lawrence J. was right then only those companies whose controllers hold 76 per cent. of the shares will be within that section. As a matter of construction you must not construe "public" as including those in control.

With regard to the other point, the mention of the shares in the official list was not a quotation within the meaning of s. 21, sub-s. 6 (as amended), of the Act of 1922, but merely a record of a transaction.

Tucker K.C. and *T. N. Donovan* for the respondents were not called upon to argue.

Scott L.J. This is an appeal from a judgment of Lawrence J. on a question about a company which it is said comes within the scope of s. 21 of the Finance Act, 1922, as subsequently amended in various ways which do not affect the question at issue in this appeal. The company is the Tatem Steam Navigation Company, Ld.; and the Crown contends that it is a company in which there were not more than five persons who controlled it, that it was not a subsidiary company and not "a company in which the public were substantially "interested," conditions of the applicability of the section contained in sub-s. 6. The appeal turns on the third condition.

In the special case it is found as a fact that the total of the issued shares in the years in question (which need not be treated differently) was 350,000 1*l*. shares, with equal voting rights; and that between 93,000 and 96,000 of those shares were held by persons other than the five or less persons who exercise control over the company. The Crown contend that that holding (which, it may be observed, was substantially more than 25 per cent.) did not prevent the company falling within s. 21 of the Act of 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927, because the persons so holding those shares were, to an extent which reduced the public holding below 25 per cent., not members of the public, or, alternatively, did not hold their shares in the capacity of members of the public.

Amongst the shareholders holding the 90,000 odd shares was Mrs. Blyth, a niece of Lord Glanely, who was the primary personal owner of shares in the company, holding between 160,000 and 170,000 shares. The niece held in 1935 20,000 shares; and in 1936–7, the other two years relevant to the appeal, 22,100 shares. Of those shares 4000 had been purchased by Mrs. Blyth herself and 16,000 shares had been transferred to her by Lord Glanely, her uncle, as a gift in March, 1928, in connection with her then impending marriage. They were settled by her on the terms of her marriage settlement. Subsequently, she bought another 2100 shares. If her total holding of 22,100 shares, or even the 16,000 gift shares, were struck out of the 90,000 odd shares to which I have referred, the result would be that less than 25 per cent. of the shares would be held by the public. Of that there can be no question.

The issue in the case is thus whether the 16,000 shares were held by her as a member of the public, and that question depends on the meaning of the words "the public" in the sub-section. The provision that the shares must have been allotted to or acquired by the persons holding them unconditionally is not in issue for it is not disputed that these shares were acquired by Mrs. Blyth unconditionally and so held for the rest of the time in question.

On the questions of the further conditions as to there having been dealings in the shares on a stock exchange in the United Kingdom, and as to the shares having been quoted in the official list of such a stock exchange, I agree with Lawrence J.

On the main question, the commissioners held as follows: "Assuming that the 4,000 and 2,100 shares purchased by Mrs. "Blyth can be said to have been acquired by her as a member

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"of the public, there remains the 16,000 given by Lord Glanely "to his niece . . . . In our opinion it cannot be said that "these 16,000 shares were allotted to, or acquired by, the "public." Then they gave various reasons, with all of which I disagree: "They were not purchased in the market or "acquired in any way for valuable consideration." The fact that they were not purchased, or were not acquired for valuable consideration, in my opinion, is an irrelevant matter. The commissioners go on: "They were a personal gift from Lord "Glanely, who controlled the company, out of his own private "holding of shares." The fact that they were a gift, the fact that Lord Glanely was her uncle, and the fact that they were coming out of his own private holding of shares, are all, in my opinion, irrelevant matters in considering the construction of this section. So are the facts that they were an accretion to her marriage settlement funds, and that Lord Glanely was one of the trustees of this settlement. Then the commissioners go on: "Upon these facts we find that this transaction was "not an acquisition by an allotment to the public." Of course it was not an allotment to the public; but it was an acquisition by her from her uncle. I cannot understand why the fact that she was a niece, or that it was a gift, or that it was for the purpose of her marriage settlement, makes any difference at all.

The scheme of the sub-section undoubtedly was that where the control of a company is in fact held by not more than five persons, and the company is not one in which the public are substantially interested in the manner indicated by the proviso, the persons controlling the company should be treated as running it in their own interests, and therefore, in a position which, from the public point of view, ought to make them liable to pay supertax just as if the company had been a firm, and they had drawn their share of profits direct from the business. But a limitation was imposed on that general principle, not only by limiting it to a case of not more than five persons having control and by excluding the case of a subsidiary company, but also by the provision that if the public hold shares to the extent of 25 per cent., that takes the company wholly outside the section. I can see no reason whatever for introducing any other notions of control than those plainly indicated in the section as constituting the de facto control, which is what the section primarily contemplates. There is no suggestion and no evidence and no finding that Lord Glanely had in fact any control over his niece. Nor is there any suggestion that his niece was a nominee of his, or of any of the other persons within the limited category of five. Nor is there any suggestion that he ever had any influence over her. An implication of control is raised by the statutory presumption in the case of husband and wife, ancestor, lineal descendant, brother and sister; but in the case of no others. Consequently we must regard a person in the position of a niece as being treated by the statute as a member of the public. The statute contains no prohibition against avuncular generosity, any more than against generosity to a person between whom and the donor there is no consanguinity or relationship at all.

That being so, I agree with the learned judge who held, disagreeing with the commissioners, that the commissioners had drawn an inference of law for reasons which in law amounted to no reasons at all. I have only added my own words about the section because it is said that the question is one of general importance; but, in my view, its meaning is clear. There is no reason why the word "public" should be given anything but its ordinary meaning. The definition contained in Murray's Oxford Dictionary is: "The community "as an aggregate, but not in its organised capacity; hence, "the members of the community," and it is in that sense, as it seems to me, that the words "the public," are used in this section. Consequently, it follows that there is in this case a holding of more than 25 per cent. of the shares by the members of the public.

I listened with interest to the argument of Mr. Attorney that that interpretation of the section is impossible: but, quite frankly, I am not able to follow the reasoning by which he sought to arrive at that conclusion: and, therefore, I do not attempt to deal with it. I agree with the whole of the learned

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judge's judgment, to whom the same argument was addressed. The appeal must be dismissed with costs.

Clauson L.J. I agree with my Lord's judgment and also with that of Lawrence J., who, if I may respectfully say so, in my judgment dealt with the case with complete accuracy. In these circumstances, I do not find it necessary to add any observation of my own.

Goddard L.J. I agree with the judgment of the Lord Justice and of Lawrence J. in its entirety, both on the question whether Mrs. Blyth's shares were to be regarded as held by a member of the public, and on his finding in support of the commissioners on the point about the quotation in the official list.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *W. A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

W. L. L. B.

LEICESTERSHIRE COUNTY COUNCIL *v.* MICHAEL FARADAY AND PARTNERS, LIMITED.

C. A.

K. B. D.

1941

March 3.

C. A.

May 22.

Rates—Rating valuers—Employment by rating authority to give advice and assistance in connection with valuation of hereditaments—Documents, books, maps and plans relating to valuation—Ownership—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 38.

A company carrying on business as rating valuers was employed by a county council, under the powers conferred by s. 38 of the Rating and Valuation Act, 1925, for five years to give advice and assistance in connection with the valuation of hereditaments in their area and to take steps to secure uniformity of valuation throughout it at a remuneration which was to be inclusive of all out of pocket expenses, office accommodation, staff, notebooks, plans, etc. The valuers, on receiving instructions, were to inspect and value any hereditament within the county area and report thereon. At the termination of the five years' agreement the rating authority claimed that they were entitled to all documents, books, maps, and plans which had been prepared by, or had come into the possession of, the valuers in the course of, or for the purpose of, the performance of their duties. The agreement under which the valuers were employed contained no provision for the delivery up of the documents. In an action by the county council for the delivery up of the documents:—

Held, by the Court of Appeal, affirming Macnaghten J., that the relationship between the county council and the valuers was that of client and professional man and not that of principal and agent; that the documents which the valuers had prepared in carrying out their expert work were their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over.

London School Board v. *Northcroft* (1889) Hudson's Building Contracts, 4th ed., vol. ii., p. 147, approved and followed.

APPEAL from Macnaghten J. in an action tried without a jury at Leicester Assizes.

The plaintiffs, the Leicestershire County Council, claimed from the defendants, Michael Faraday and Partners, Ld., the delivery up of certain documents which the plaintiffs alleged were their property.

Sect. 18 of the Rating and Valuation Act, 1925, provides for the establishment in every county of a valuation committee charged with the duty of taking such steps as they may think fit for promoting uniformity in the principles and practice of valuation and of assisting rating authorities and assessment committees in the performance of their functions under Part II. of that Act. By s. 38 a county valuation committee may, if they think fit, employ a competent person "to give advice "and assistance in connection with the valuation of any "hereditaments in their area," and a person so employed may, subject to the conditions prescribed by the section, enter on, survey and value any hereditaments in the area which the committee may direct him to survey and value.

The defendants, Michael Faraday and Partners, Ld., were a company registered under the Companies Act to carry on the profession or business of rating valuers and surveyors.

By an agreement made between the plaintiffs and the defendants, dated July 29, 1933, the defendants undertook for the remuneration therein set out to value the whole of the rateable hereditaments existing on September 30, 1932, in Leicestershire, except the railways and the de-rated agricultural land and buildings; to advise the county council, and, subject to their direction, the rating authorities and assessment committees in the county area generally with regard to their powers and duties in respect of valuations under the Rating and Valuation Acts, 1925 and 1929; to attend (if and when required) such meetings of the county valuation committee or of the rating authorities or such conferences or meetings as the plaintiffs or the county valuation committee might arrange; and generally to take such other steps as the plaintiffs might direct with a view to securing uniformity of valuation throughout the county. The agreement provided that the defendants would at their own expense provide an office in the city of Leicester and would pay all out-of-pocket disbursements for assistance, travelling, motor cars, maps, stationery, etc., that Mr. Philip Michael Faraday and his co-director, Mr. Robert Eales, would personally direct, control and supervise all the work to be performed thereunder, and that the agreement would remain in force until September 29, 1936.

By a further agreement dated January 1, 1935, the plaintiffs, pursuant to the powers conferred by s. 38 of the Rating and

Valuation Act, 1925, agreed to employ the defendants for the term of five years from the date thereof to give advice and assistance in connection with the valuation of hereditaments in Leicestershire at an annual remuneration of 2500*l.*, payable quarterly at the end of each quarter. By that agreement, it was provided by clause (*c*) that the defendants should take such steps as the county valuation committee might direct with a view to securing uniformity of valuation throughout the county area. By clause (*e*) it was agreed: "The "valuers shall make the annual revision of the assessments "relating to collieries, quarries and brickworks within the "county area and in respect of any other type of property "which the county valuation committee may deem desirable "to include for annual revision." By clause (*f*): "From "time to time and so often as the same shall occur upon "receipt of instructions from the county valuation committee "the valuers shall inspect and value any hereditaments "within the county area (including special properties) and "shall report upon such valuation to the county valuation "committee, rating authority or assessment committee, as "the case may require as soon as possible after receiving their "instructions. Provided always that the aforesaid instruc-"tions shall not include the total or materially the total "valuation of all rateable properties in the county area." By clause (*g*) as regards special new valuation lists, the valuers were to inspect properties "and shall report upon such valua-"tions to the county valuation committee, rating authority or "assessment committee as the case may require as soon as "possible after receiving instructions." The agreement also provided that "The salary shall be inclusive of all out-of-pocket "expenses including cost of transport, office accommodation, "staff, note-books, plans, etc., that may be necessary to "carry out the work but shall not include the cost of any "statutory forms that may be required and which will be "provided by the county valuation committee or the rating "authority as the case may be." The defendants undertook to continue their own office in the city of Leicester and provide an adequate staff to carry out their duties under the contract and to arrange for Mr. Faraday, Mr. Eales, or one of the directors of the company to direct, control and supervise all the work to be performed under the agreement. The agreement also provided that "if at any time during the term "of this contract the valuers shall fail to carry out the terms "herein contained or any of them the council shall be entitled "forthwith to cancel the contract and the same shall be null "and void . . . ."

By a third agreement dated November 2, 1939, it was provided that the defendants should continue to perform the work for a further period of three years from January 1, 1940. The agreement contained precisely the same provisions as those in the agreement of January 1, 1935, except that it stipulated that Mr. Eales should personally supervise the work to be performed by the defendants, and it contained three additional clauses, namely, (1.) that the defendants would give advice on all questions affecting the valuation of railways; (2.) that they would prepare any reports, statements or statistics required by the county valuation committee; (3.) that on the expiration of the agreement, all valuations made thereunder and all books, maps, plans and other documents relating to the preparation of the third new valuation list and in connection with the valuation of all special properties should belong to the plaintiffs and should be handed over to them.

Soon after the execution of this agreement a dispute arose between Mr. Eales and the defendant company and he resigned his directorship. The defendants informed the plaintiffs that Mr. Eales had resigned and would, therefore, be unable to continue his supervision of the work to be performed under the new agreement, and they inquired whether in view of that fact the plaintiffs desired to exercise the right of cancellation reserved to them by the agreement. On December 22, 1939, the plaintiffs gave notice of cancellation, and, therefore, the agreement of November 2, 1939, never came into force. Accordingly, when the agreement of January 1, 1935, came to an end, the defendants closed their office in Leicester and removed all the books, papers and documents which were then at that office, to London. The documents so removed to London included a number of documents which, the defendants admitted, belonged to the plaintiffs and in June, 1940, these documents were handed over to them. They included the statutory returns, notices of proposal and notices of objection. On July 6, 1940, the plaintiffs' solicitors wrote making a formal demand on the defendants for the delivery up of the documents described in a schedule enclosed with the letter, as follows: Inspection notes, valuation sheets, summaries and plans relating to all the schools, council houses, public buildings, public works and undertakings, hospitals, convalescent homes and institutions and similar properties throughout the county; all the factory buildings in the Hinckley urban district; and two thousand particular hereditaments specified by name; and inspection notes, particulars and forms relating to railway "let out" properties, together with correspondence, notes and other correspondence from the railway assessment authority. The defendants refused to comply with this demand and on September 5, 1940, the plaintiffs began this action to enforce their right to the documents.

By their statement of claim the plaintiffs alleged that the duties of the defendants under the agreement of January 1, 1935, "involved and necessitated the use and preparation "by the defendant company of field books, lists of properties, "records of assessments, accounts, reports, memoranda, "calculations and detailed particulars, plans, surveys, and "other documents relating to properties, valuations, or "assessments, or to proceedings connected therewith, made or "taken from time to time within the area of the plaintiff "council, and it so became and was the duty of the defendant "company duly to make, use, and preserve for the plaintiff "council, and, at its request, to deliver or return to its officer "or agent authorized to receive them, all such documents, "records and things which are and so became the council's "property." The plaintiffs claimed (I.) a declaration "that "the council are the owners and entitled to possession of the "documents and things described or referred to in a schedule "contained in a letter dated July 6, 1940, from the council's "solicitors to the defendant company, or (alternatively) to "all documents, books, maps, plans and other materials or "particulars prepared by, or which came into the possession "of, the defendant company in the course of or for the purpose "of their performance of their duties as the council's valuers "under the written agreement dated January 1, 1935, between "the council and the defendant company," and (2.) an order for the delivery up of all such documents. By their defence the defendants admitted the agreement of January 1, 1935, and "that their duties under the said agreement necessitated "the use and preparation by the defendants of documents "of the classes enumerated in para. 2 of the statement of "claim, but deny that it became or was their duty to make, "use, or preserve the same for the plaintiff council, and deny "that it was their duty to deliver or return the same to the "plaintiffs' authorized officers or agents at the plaintiffs' "request, or at all, and deny that the same are or became the "plaintiffs' property."

An order for discovery of documents was made on December 9, 1939, but all the documents which were the subject of this action were excluded from the scope of the order. The result of that limitation was that, apart from the admission contained in the defence, there was no evidence that any such documents existed, and none of the documents were produced at the trial.

The case was tried by Macnaghten J. at the Leicester Assizes on March 3, 1941.

No oral evidence was given at the trial on behalf of the plaintiffs, but evidence was given by Mr. P. M. Faraday and other rating surveyors to the effect that documents such as those claimed in this action belonged, according to the usual practice in the profession, to the surveyor and were retained by him unless the terms of his employment expressly provided to the contrary. The agreement of January 1, 1935, contained no such provision.

R. A. Willes for the plaintiffs.

Comyns Carr K.C., *A. H. Bidder* and *S. L. Elborne* for the defendants.

MACNAGHTEN J. [stated the facts set out above, and continued :] Mr. Willes, on behalf of the plaintiffs, submitted that, although the agreement of January 1, 1935, contained no express provision for the delivery up of the documents in question, on the true construction of the agreement such an obligation was necessarily implied. He cited in support of his argument the decision of Sir John Romilly M.R. in *Lady Beresford* v. *Driver* (1). In that case Lady Beresford, who was the lady of the manor of Waterbeach in Cambridgeshire, claimed against Messrs. Driver, who had been for a number of years her land agents, the delivery up of documents and maps relating to the estate. When the case first came before the Master of the Rolls, he stated that it was impossible to decide the matter without seeing the documents. The documents were subsequently produced for inspection and the Master of the Rolls decided that some of the documents claimed by the plaintiff belonged to her and ordered the defendants to deliver them up. Among the documents ordered to be delivered up were some memorandum books relating to the manor, a private rental and cash book, and a field book, and it is said that the documents in question in the present action are similar in character. But I do not think that the position of a land agent employed, as Messrs. Driver were, to collect rents on commission and to perform all the usual duties of such agents with regard to the letting of farms, repairs of buildings, and so on, is really analogous to that of a rating surveyor employed to survey and value rateable hereditaments. I feel, like Sir John Romilly M.R., great difficulty in coming to a decision without seeing the documents in question. The "inspection notes" mean, I presume, notes made on the inspection of a hereditament. I am far from clear what the words "valuation sheets" and "summaries" mean and I should have been glad to see at least a specimen "valuation sheet" and a specimen "summary."

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(1) (1851) 20 L. J. (Ch.) 476; (1852) 22 L. J. (Ch.) 407.

Under the agreement the defendants were bound to make a report to the plaintiffs whenever they were required to inspect and value any hereditament, and I presume that those reports were duly made and contained all the information which the plaintiffs required. It seems to me that the notes made by Mr. Eales when he inspected the hereditaments which he was required to survey and value are documents which belong to the defendants, and that, now that their employment is ended, they are under no obligation to deliver the original notes or copies of them to the plaintiffs, and, in my view, the valuation sheets, summaries and plans are likewise the property of the defendants and do not belong to the plaintiffs. Of all the documents comprised in the schedule there is but one class which may belong to the plaintiffs and ought to be delivered up, namely, the documents described as "correspondence, "notes and other documents from the railway assessment "authorities" relating to railway "let out" properties. Letters, if such there be, written by the railway assessment authorities to the defendants as the agents of the plaintiffs would prima facie belong to the plaintiffs, but the agreement of January 1, 1935, contains no express provision with regard to railway "let out" properties, and there is no evidence before me that any such letters exist. In any case, if such letters do exist, the matter is not, it would seem, of much importance, for I presume copies of them could be obtained from the railway assessment authorities. In my opinion the claim made by the plaintiffs fails, and the action must be dismissed.

Judgment for defendants.

The plaintiffs appealed.

Macaskie K.C. and *Gerald Gardiner* for the plaintiffs. The plaintiffs are entitled to the possession of the documents which they claim and which were prepared by, or came into the possession of, the defendants in the course of or for the purpose of the performance of their duties as the council's valuers under the agreement of January 1, 1935. Under s. 18 of the Rating and Valuation Act, 1925, the plaintiffs

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have the duty to take such steps as they may think fit for promoting uniformity in the principles and practice of valuation. In securing that uniformity the plaintiffs would have to bring into existence a number of documents. Under s. 38 of the Act of 1925 the plaintiffs were entitled to employ a competent person to give advice and assistance with regard to the valuation of any hereditament. When a valuer is appointed to carry out the duties which normally would fall on the plaintiffs, he must, to carry out his duties, make notes, memoranda, and so on, and these documents are the property of the plaintiffs. Otherwise there would be a gap of five years in the plaintiffs' records which would prevent their securing uniformity of rating. When a professional man is employed for reward to inspect and report on properties, and in the course of discharging that employment he has to bring into existence notes, memoranda, field books and plans, those documents belong to the persons who employed him. The valuation lists are prepared at intervals of five years, but there are annual revisions, and, therefore, there is a continuing duty upon the plaintiffs which is delegated by the rating authority to the valuers. In *In re Burnand* (1) Vaughan Williams L.J. said in the course of the argument: "Prima "facie the man who pays for the books is entitled to them." In *Lady Beresford* v. *Driver* (2) land agents, who were paid by commission, were ordered to produce and subsequently to deliver up such maps, plans and other documents relating to the plaintiff's estates as were made or collected by them in the course of their employment, even though it was alleged that they were made for the land agents' private use. In the present case the defendants' salary was expressed to be inclusive of all out-of-pocket expenses, including note books, plans, etc., that might be necessary to enable them to carry out the work. Therefore the plaintiffs have paid for the note books and plans and whatever is covered by "etc." In *Gibbon* v. *Pease* (3) it was held that a building owner was entitled to recover from his architect the plans for which the architect had been paid. In *Ex parte Horsfall* (1) a solicitor, on receiving the amount of his bill, was held to be bound to deliver up to his client, not only original deeds belonging to him, but also the drafts and copies. Here the plaintiffs paid, not merely for the final result of the defendants' work, but also for all the information collected and collated by the defendants to produce the final result. It is stated in Halsbury's Laws of England, 2nd ed., vol. xxxi., p. 102, that "documents coming into existence in the course of business "transacted under a retainer, and either prepared for the "benefit of the client, or received by the solicitor as agent for "the client, belong to the client." In the present case the documents were prepared by the defendants for the benefit of the plaintiffs who will be seriously handicapped if they do not have the calculations for a period of five years. *London School Board* v. *Northcroft* (2) is distinguishable.

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(1) [1904] 2 K. B. 68, 73.
(2) 20 L. J. (Ch.) 476; 22 L. J. (Ch.) 407.
(3) [1905] 1 K. B. 810.

Comyns Carr K.C. and *A. H. Bidder* for the defendants. The duty to hand over these documents is not expressed in the contract, and, therefore, the plaintiffs must show that it was an implied term, but the plaintiffs have failed to point to anything in the contract from which such a term could be implied. Under s. 38 of the Act of 1925 a rating authority does not delegate to an agent what they could do themselves, and, therefore, this case has no analogy to the case of *Lady Beresford* v. *Driver* (3). A rating authority has no power to enter on premises compulsorily, but, if they appoint a professional valuer to assist them, the valuer has a right under the section to enter compulsorily on premises to value them. Much of the information that is given to a professional valuer by an occupier of premises is in confidence, and he must not disclose it to the rating authority. [He was stopped.]

Gardiner replied.

MacKinnon L.J. [after stating the facts :] The difficulty that the learned judge below felt (which I share to the full)

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(1) (1827) 7 B. & C. 528.
(2) (1889) Hudson's Building Contracts, 4th ed., vol. ii., p. 147.
(3) 20 L. J. (Ch.) 476 ; 22 L. J. (Ch.) 407.

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was to understand to what precise sort of documents the statement of claim refers. One must assume that during the five years of the defendants' employment all the documents which it was the duty of the defendants, pursuant to the terms of the contract, to prepare and forward to the plaintiffs, have been duly prepared and furnished, because there is no complaint of any failure by the defendants to do that. These other documents are apparently the memoranda, notes on scraps of paper, and various other things that may have come into existence, jotted down perhaps in a note book by the man who carried out the duty of inspecting a hereditament and making up his mind about its valuation. It is suggested that all pieces of paper of that description used by the defendants in the course of their visits and of making their estimates of values became the property of the plaintiffs directly they came into existence. There is nothing in the contract itself which supports any such proposition. The only passage in the contract which is relied on is the reference to plans which provides that the salary of 2500*l.* a year "shall be inclusive of all out-of-pocket "expenses, including cost of transport, office accommodation, "staff, note books, plans, etc., that may be necessary to "carry out this work." It is fairly obvious that the reference to note books and plans is a quite unnecessary addition to the provision that the salary is an inclusive salary, and that the defendants are to pay their own out-of-pocket expenses in the nature of office accommodation, wages, stationery and the other things which they have to provide to carry on their work.

If there is nothing in the contract on which the plaintiffs can rely to establish that they are right in saying that these pieces of paper are their property, by what rule of law otherwise can they assert that that is so? I know of none. Some reference has been made to, and reliance placed on, one or two cases which were cited by Mr. Macaskie, such as *Lady Beresford* v. *Driver* (1) and *Gibbon* v. *Pease* (2), but I think that those

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(1) 20 L. J. (Ch.) 476; 22 L. J. (Ch.) 407.

(2) [1905] 1 K. B. 810.

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cases are radically different from the present case, as being concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to Mr. Macaskie during the argument, than his solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal.

I have, perhaps, said too much in regard to this case, because it would have been sufficient, I think, if I had said that I entirely agreed with the very careful judgment of Macnaghten J., and with the reasons that he gave for rejecting the plaintiffs' claim. I think that he was quite right, and that as a result this appeal fails.

GODDARD L.J. I agree. *London School Board* v. *Northcroft* (1), which was referred to in the course of the argument, was a case exactly like this, and in it A. L. Smith J. emphatically asserted that detinue would not lie for documents of exactly the same class as these; memoranda which were in the possession of quantity surveyors who had been employed by the London School Board, and which the quantity surveyors had prepared for their own use in measuring up certain buildings. The learned judge said (1): " Now I should like "to know how it can be said that what I call the private "memoranda, which were made by Messrs. Northcroft for "the purpose of framing that which ultimately became the "property of the plaintiffs, namely, the bill of quantities, "ever became the property of the plaintiffs. The paper "belonged to Messrs. Northcroft, the ink belonged to Messrs. "Northcroft, and the brains that put the calculations on "paper belonged to Messrs. Northcroft, and I want to know "how that document which came into existence ever became "the property of the plaintiffs. In my judgment it never did, "and therefore the demand which was made . . . . for the "return of this manuscript was illfounded in law." It seems to me that is exactly the case here. If, indeed, authority were needed for the proposition, which seems to me a pretty plain one, *London School Board* v. *Northcroft* (1) is a direct authority of an eminent judge that in circumstances such as these there is no claim against professional men for the documents which they prepare to enable them to carry out the work which they are employed to do.

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(1) Hudson's Building Contracts, 4th ed., vol. ii., p. 147.

DU PARCQ L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Kingsford, Dorman & Co., for L. E. Rumsey, Leicester.*

Solicitors for respondents: *Richardson, Sadler & Co.*

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(1) Hudson's Building Contracts, 4th ed., vol. ii., pp. 147, 149.

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May 7, 8.

SUMMERS v. SALFORD CORPORATION.

Landlord and tenant—Housing—Repair, maintenance and sanitary condition of houses—Small houses—Obligation of landlord—Implied term in letting that house will be kept "reasonably fit for human habitation"—Lack of ventilation in a bedroom—Defective sash-cord —Housing Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 51), *s.* 2, *sub-ss.* 1, 4; *s.* 188, *sub-s.* 4.

Sect. 2, sub-s. 1, of the Housing Act, 1936, provides that in any contract for letting a house for human habitation (situated elsewhere than in the administrative county of London) at a rent not exceeding 26*l.*, "there shall, notwithstanding any stipulation "to the contrary, be implied a condition that the house [which, "by s. 2, sub-s. 4, includes part of the house] is at the com-"mencement of the tenancy, and an undertaking that the house "will be kept by the landlord during the tenancy, in all respects "reasonably fit for human habitation."

The plaintiff was the tenant of a house owned by the defendant corporation, to which the provisions of s. 2, sub-s. 1, of the Act of 1936 applied. In February, 1940, a sash-cord of the only window in one of the bedrooms broke, and the window stuck. The plaintiff asked the rent collector of the corporation to have the cord repaired, but nothing was done. On April 30, 1940, while the plaintiff was cleaning the window, the other sash-cord broke, her hand was jammed between the two parts of the window and she was severely injured. In an action by the plaintiff against the defendants claiming damages for personal injuries due to a breach by the defendants of the term to be implied in the contract for letting the house:—

Held, by MacKinnon L.J. and Stable J., Luxmoore L.J. dissenting, that the breaking of the sash-cord did not render the house unfit for human habitation within the meaning of the sub-section, so that the defendants were not in breach of the implied undertaking and the plaintiff could not succeed in the action.

Decision of Croom-Johnson J. affirmed.

APPEAL from Croom-Johnson J.

The plaintiff was the tenant under a weekly tenancy of a house owned by the defendant corporation to which the provisions of s. 2, sub-s. 1, of the Housing Act, 1936, applied. In February, 1940, the left-hand upper sash-cord of the only window in one of the two bedrooms in the house broke, and the window stuck. The plaintiff gave notice to the rent collector of the corporation and asked that the cord should be repaired, but nothing was done. On April 30, 1940, while she was cleaning the window, the other sash-cord broke, her hand was jammed between the upper and lower parts of the window, and she was severely injured. The plaintiff, thereupon, brought this action against the corporation claiming damages for personal injuries, which, she alleged, were due to a breach by the corporation of the undertaking to be implied in the contract for letting the house by reason of s. 2 of the Housing Act, 1936, namely, that it should be kept in all respects reasonably fit for human habitation. Croom-Johnson J. held that one sash-cord being broken did not prevent the house from being in all respects reasonably fit for human habitation within the meaning of s. 2, sub-s. 1, and he gave judgment for the corporation. The plaintiff appealed.

N. Harold Lever for the plaintiff. By s. 2, sub-s. 1, of the Housing Act, 1936, the landlord of a house that comes within the sub-section must keep the house " in all respects reasonably "fit for human habitation." This the defendants failed to do. It is a serious matter if a bedroom is left without air, owing to inability to open the only window in the room, and the house in which such a room is cannot be said to be " reasonably "fit for human habitation." Even if it could be, " house " in s. 2, sub-s. 1, includes part of a house (s. 2, sub-s. 4). A room is part of a house and a room with no ventilation cannot be said to be " in all respects reasonably fit for human "habitation." The decision in *Morgan* v. *Liverpool Corporation* (1), where it was held that the landlords were not liable, turned on the fact that the tenant had not given notice to the landlords that a sash-cord was broken, and the case is distinguishable on that ground, but Atkin L.J. in his judgment expressed the view that a broken sash-cord in a room would render a house unfit for human habitation within the meaning of s. 2, sub-s. 1. [He also cited *Fisher* v. *Walters* (2).]

Humfrey Edmunds for the defendants. On the facts in this case there is nothing in the suggestion of lack of ventilation. The lower half of the window could have been

(1) [1927] 2 K. B. 131. (2) [1926] 2 K. B. 315.

opened. *Morgan* v. *Liverpool Corporation* (1) was decided on identical facts, and the observations of Lord Hanworth M.R. and Lawrence L.J. show that they did not consider that the breaking of one sash-cord of a window rendered a house unfit for human habitation. Sects. 9 to 12 of the Act of 1936 indicate that the standard which the legislature had in view with regard to the fitness or unfitness of a house for human habitation was whether or not the house ought to be demolished. The plaintiff's proper remedy was to sue the corporation to do the repair to the window, or to do it herself and sue the corporation for the cost.

Lever replied.

MACKINNON L.J. [stated the facts, read s. 2, sub-s. 1, of the Housing Act, 1936, and continued:] That provision is a repetition totidem verbis of s. 14 of the Housing and Town Planning Act, 1909, and s. 1 of the Housing Act, 1925. There is, however, the difference between the 1936 Act and the Acts of 1909 and 1925, that the Act of 1936 contains, as the others do not, a definition of what is meant by "reasonably "fit for human habitation." That appears in sub-s. 4 of s. 188: "In determining for the purposes of this Act whether a house "is fit for human habitation, regard shall be had to the extent, "if any, to which by reason of disrepair or sanitary defects the "house falls short of the provisions of any byelaws in operation "in that district or of any enactment in any local Act in operation in the district dealing with the construction and drainage "of new buildings and the laying out and construction of new "streets or of the general standard of housing accommodation "for working classes in the district." In the present case the matter in question must be disrepair, for I cannot think that the fracture of one sash-cord of a window, or the weakness of the other one, can be said to be a sanitary defect. There was no evidence of any byelaws in operation in the district or of any enactment in any local Act, nor of the general standard of housing accommodation for the working classes in the district, and I do not think that a reference to the matters which are directed in sub-s. 4 of s. 188 can be of any service here.

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(1) [1927] 2 K. B. 131.

The whole question is whether the plaintiff can establish that the failure of the defendants to mend this piece of rope on one side of a window was a failure by them to keep the house "in all respects reasonably fit for human habitation." The obligation to do so imposed by s. 2, sub-s. 1, clearly cannot be an obligation to keep the house at all times in perfect repair. I imagine it must be a less onerous obligation than would be imposed by a covenant by a landlord to keep the premises in good and tenantable repair. The words "kept . . . . in all respects reasonably fit for human "habitation" are not words of art taken from the usual provisions of covenants in leases. They are words almost of journalistic generality, and I find it extremely difficult to make up my mind whether it can possibly be said that a failure to put right one broken sash-rope can be treated as a breach of a statutory obligation to keep a house in all respects reasonably fit for human habitation, having regard to the general standard of housing accommodation for working classes in the district, as to which I have no information whatever.

It is an extremely difficult problem which the legislature has provided for any judge, but, on the whole, I think that Croom-Johnson J. was right in coming to the conclusion that this accident was not proved to be due to any failure by the defendants to keep the house in all respects reasonably fit for human habitation. Croom-Johnson J. was to some extent influenced—I do not know whether he felt himself bound—by *Morgan* v. *Liverpool Corporation* (1), a decision under the Housing Act, 1925. A similar accident had occurred there through the breaking of a sash-cord, and the judge of the Court of Passage had given damages to the plaintiff. An appeal by the defendants was allowed on the ground, approved by all the members of the court, that the landlord in such a case could not be held liable if no notice of the defect had been given to him, but, incidentally, each member of the court expressed his opinion on what would have been the result if notice had been given, as it was given in this case. Lord

(1) [1927] 2 K. B. 131.

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Hanworth M.R. and Lawrence L.J. were of the opinion that the defendants would have escaped liability, Lawrence L.J. (1) expressing himself much more strongly to that effect than the Master of the Rolls, while Atkin L.J. (2) expressed an opinion in the contrary sense. The effect of that difference of opinion is to show, as I think, how very difficult it is to give a legal interpretation to these words of vague and unscientific usage. But it is for the plaintiff to establish her case, and, on the whole, I have come to the conclusion that she did not establish that the defendants had failed to keep the premises reasonably fit for human habitation. That being so, I think the appeal fails and must be dismissed.

LUXMOORE L.J. This is, I think, a difficult case and I confess that during the hearing of the appeal my mind fluctuated from time to time, but I have come to the conclusion that the appeal ought to be allowed on the main question, namely, the liability of the corporation to pay to the plaintiff damages in respect of the serious injury she has suffered. [His Lordship stated the facts.]

The first question to be determined is one of law. If the corporation is to be held liable, it must be because they are under a duty to repair the cords of the upper sash of the window in question by reason of the provisions of s. 2, sub-s. 1, of the Housing Act, 1936, for there is nothing in the conditions of tenancy set out on the back of the rent book which can be said to render the corporation liable to do this repair. [His Lordship read s. 2, sub-s. 1, and s. 188, sub-s. 4, of the Act.] There are, I understand, no byelaws in operation in the district, nor are there any local Acts dealing with the construction and drainage of new buildings or the laying out and construction of new streets which need be considered, nor was there any evidence given of the general standard of housing accommodation for working classes in the district, but it seems plain that, in considering the question whether a house is "in all respects reasonably fit for human habitation" it is necessary to consider the disrepair and sanitary defects,

(1) [1927] 2 K. B. 131, 152. (2) Ibid. 144.

which are alleged to exist. "Sanitary defects" are defined in s. 188, sub-s. 1, as including "lack of ventilation."

I agree that, at first blush, it would seem extravagant to say that a house is not fit for human habitation because the cords supporting one of the sashes of one of the windows in it are broken or in such a state that they are likely to break at any moment. This may well be due to the tendency to connect the phrases "fit" or "unfit for human habitation" with a demolition order. But that idea is, I think, dissipated when it is recalled that the powers of the local authority under the Housing Act, 1936, and its predecessors are more usually directed to cases where the unfitness may be due to want of repair remediable at a reasonably small cost. It is to be observed that the duty imposed on the landlord by the Act is to keep the house, including a part of it (s. 2, sub-s. 4), "in "all respects reasonably fit for human habitation," and that one of the essential matters by which its fitness for human habitation is to be ascertained is the existence or lack of ventilation. The usual method of providing ventilation for a room in a dwelling house is by a window or windows, which is, or are, so constructed as to open or shut without danger to the person opening or shutting it or them. If a room, especially a bedroom, has only one window and that window cannot be opened or shut without danger to the person seeking to perform that operation, that room may, in my opinion, be said to be not fit for human habitation. Where the house of which the room forms a part, is within the provisions of s. 2, sub-s. 1, of the Housing Act, 1936, and the landlord has had notice of these facts, he has, in my judgment, failed to perform the undertaking which is to be implied in his contract with the tenant that he will keep a part of the house—that is, the room in question—"in all respects reasonably fit for human "habitation."

The case is not free from authority for Sir Francis Taylor K.C., the judge of the Liverpool Court of Passage, held in 1927 that the tenant of an industrial dwelling house, which as regards rent came within the provisions of the Housing Act, 1925 (from which s. 2 of the 1936 Act is directly derived),

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was entitled to recover damages from his landlord in respect of an accident suffered by him when the top of a window which he was opening fell and seriously crushed his hand owing to the breaking of the sash-cord. The ground of Sir Francis Taylor's decision was the failure of the landlord to keep the house " in all respects reasonably fit for human habitation." The case—*Morgan* v. *Liverpool Corporation* (1)—came to this court which allowed the appeal on the ground that it was a condition precedent to the liability of the landlords that notice should be given to them of what was out of repair and that, as they had not received any notice of the want of repair in question, their liability under the implied undertaking had not arisen. All three members of the court were unanimous on this point, but there was a difference of judicial opinion on the question whether, if the landlords had had notice that the sash-cord was defective, they would have been liable because the house could not be said to be in all respects reasonably fit for human habitation. Lord Hanworth M.R. and Lawrence L.J. expressed the view that the question should be answered in the negative, while Atkin L.J. stated that, in his opinion, the answer should be in the affirmative. These opinions were obiter, and there is no decision binding on this court on what is the proper answer to the question in this case, namely, was the bedroom " in all respects reasonably fit for "human habitation " having regard to the fact that, by reason of the breaking of one of the cords to the upper sash of its only window, that window could not be opened without danger of personal injury? The material facts, except with regard to notice to the landlord, are substantially the same in both cases. Atkin L.J., in dealing with the question of fitness for human habitation, said that the question was really one of fact, "and while no one would say that the mere fact that one cord, "or two cords for that matter, were broken necessarily put a "house in a state in which it is unfit for human habitation, "yet when you take into consideration the class of house and "the people with whom you are dealing and the particular "circumstances of the case you may be forced to a different

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"conclusion." He further said that the standard which commended itself to him was that "if the state of repair "of a house is such that by ordinary user damage may "naturally be caused to the occupier, either in respect of "personal injury to life or limb or injury to health, then the "house is not in all respects reasonably fit for human "habitation." He went on to say: "It seems to me difficult "to say that that house in that state is reasonably fit for "human habitation, and if that rule was the correct test, I "think that the facts here bring the case within such a "definition. For this purpose it is not merely a question of a "window falling with such weight as a window sash has; "one might test it by reference to any other thing that might "be in a house, as, for instance, a gas lamp or gas chandelier "or a gas bracket or a curtain pole or any other thing which "on being touched might fall and might cause serious injury; "and if the curtain pole was in fact part of the structure of "the house, as it is conceivable it might be, and it fell within "the ordinary repairing duty of the person who has to repair, "I think that case also might very well fall within such a case "as this. There is another matter which has to be dealt "with, and that is the question of health, to which I think "the learned judge properly attached importance. If a man "is the owner of a house which has many rooms and many "windows, it may very well be that the fact that one window "will not open easily, or open at all, would be far from making "that house in any respect unfit for human habitation. But "when you are dealing with a working-class house with two "bedrooms occupied in the ordinary way in which an "industrial dwelling may be occupied, that is to say, by a "man and his wife and children, it appears to me that the "question whether or not the only window in one of the only "two bedrooms is capable of being opened with reasonable "facility, and if not opened will have to remain shut, has a "bearing upon the question whether that room is reasonably "fit for human habitation." With all respect to the contrary view expressed by Lord Hanworth M.R. and Lawrence L.J. I prefer the reasoning of Atkin L.J., and I have come to the

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conclusion that, as defendants here had notice of the breaking of the sash-cord and failed to do the necessary repair, there has been a failure on their part to comply with the implied undertaking to keep the room "in all respects reasonably "fit for human habitation" and they are, therefore, liable in law to compensate the plaintiff for the injury suffered by her by reason of that failure.

Croom-Johnson L.J. fixed the damages at 260*l.* I would allow the appeal, discharge the order of Croom-Johnson J., and direct that judgment should be entered for the plaintiff for 260*l.* and costs.

STABLE J. I agree with the judgment which has been delivered by MacKinnon L.J. The point seems to me to be a short one and incapable of much elaboration. The question, as I understand it, that I have to ask myself is whether the plaintiff has established that the part of the house with which we are concerned was in any respect not reasonably fit for human habitation. I find it impossible to say that so trifling a disrepair as a broken or defective window cord rendered that room or any part of that house not reasonably fit for human habitation.

Appeal dismissed.

Solicitors for the appellant: *Leslie M. Lever & Co., Manchester.*

Solicitors for the respondents: *L. Bingham & Co., for James Chapman & Co., Manchester.*

P. J. B.

STRAND *v.* BATH AND PORTLAND STONE FIRMS, LIMITED.

1941
May 28.

Rates—Railway—Valuation roll—Removal of hereditament therefrom —Consequent amendment of valuation list—Liability to rates— "Commencement of the quinquennial period"—Railways (Valuation for Rating) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 12, *sub-s.* 5.

On the coming into force on April 1, 1931, of the Railways (Valuation for Rating) Act, 1930, premises were entered on the railway valuation roll as a railway hereditament. On March 31, 1936, the first quinquennial period under the Act expired. In July, 1937, the valuation roll was revised, the premises then being removed from it as not being a railway hereditament. It consequently became necessary under s. 12, sub-s. 5, of the Act, to amend the current valuation list and that in force from April 1, 1929, to March 31, 1934, by inserting the premises therein.

Sect. 12, sub-s. 5, of the Act further provides: "For the "purposes of the liability of any person to rates, an amendment "made under this sub-section shall in relation to any rate have "effect . . . . as from the commencement of the quinquennial "period":—

Held, that the "quinquennial period" referred to in the subsection is that affected by the amendment and not that in which the amendment is made, and that, therefore, the occupiers of the premises in question were liable for rates in respect of the period from April 1, 1931, to March 31, 1936.

Case stated by justices.

For many years the respondents, Bath and Portland Stone Firms, Ld., had been the lessees from the Great Western Railway Co. of certain premises in the borough of Chippenham. On the coming into force, on April 1, 1931, of the Railways (Valuation for Rating) Act, 1930, the premises were entered on the valuation roll created by s. 3 of the Act, as a railway hereditament within s. 1, sub-s. 3, namely, "any hereditament "occupied for the purposes of the undertaking of a railway "company." When so treated, the premises were taken out of the ordinary valuation list in force in the borough. In July, 1937, the first railway valuation roll came to be revised under s. 10 of the Act, when it appeared that the premises were not a railway hereditament and they were taken off the roll as being "so let out as to be capable of separate "assessment" within the proviso to s. 1, sub-s. 3, notice

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thereof being duly given by the railway rating authority under s. 11, sub-s. 2. In consequence, it became necessary to amend, under s. 12, sub-s. 5, of the Act (1), both the current valuation list and that in force from April 1, 1929, to March 31, 1934, by inserting the premises therein at a net annual value of 40*l.* and rateable value of 10*l.* A claim for rates due in respect of the quinquennial period April 1, 1931, to March 31, 1936, was made on the respondents, but justices sitting at Chippenham refused to make an order. The appellant, the town clerk, appealed.

Squibb for the appellant. The question here is which period is meant by "the quinquennial period" in s. 12, sub-s. 5, of the Railways (Valuation for Rating) Act, 1930, that beginning in 1931, or that in force when the amendment was made. The words do not mean the period during which the amendment of the valuation list was made, but the period in respect of which it was made, namely, that from 1931 to 1936. It was a mere accident that the amendment was made during the second period, and the amendment was consequential on the revision of the first valuation roll, which was in force during the first quinquennial period. The present difficulty arises from the fact that the first railway valuation

(1) Railways (Valuation for Rating) Act, 1930, s. 12, sub-s. 5: "Where the effect of any information given under sub-s. 2 "of this section is that any "premises previously treated by "the authority as being a railway "hereditament . . . . have ceased "to be so treated, such amendments may be made of any "valuation list (including any "valuation list which has ceased "to be in force since the date as "from which under the provisions "of this sub-section the amendments are to have effect) by "way of proposal or, in London, "by way of provisional or supplemental list, as are necessary to "secure that those premises and "correct values and particulars "in respect thereof appear in the "appropriate part of the valuation list. For the purposes of "the liability of any person to "rates, an amendment made "under this sub-section shall in "relation to any rate have effect, "in a case where the variation "in the treatment of the premises "is due to a change occurring "during the quinquennial period "in the occupation, or the "character of the occupation, of "the premises, as from the date "of that change, and, in any other "case, as from the commencement of the quinquennial "period."

roll was not revised until it had ceased to be in force, so that during the whole of the first quinquennial period no one could say what its effect was. An amendment must relate to something antecedent, and it can, therefore, relate to the first quinquennial period. The liability to pay rates must refer to the time when the amendment of the list could have been made. It cannot depend on when it was made.

Moelwyn Hughes for the respondents. Sect. 3, sub-s. 2, of the Act provides that the period during which any roll is in force is to be referred to as a quinquennial period. The second roll was in force when this amendment was made, and the first quinquennial period had ceased. It is absurd to amend a list which has reference to a roll which is no longer in force, there being one in force at the time of the amendment. The revision of the roll does not fix the liability to pay rates, for the hereditament has first to be entered in the valuation list and the amendment of the list can only be by way of a proposal to amend the list to conform to the revision of the roll.

HUMPHREYS J. [after stating the facts :] The question in this case is simply whether or not the respondents are liable to pay rates, which admittedly they have not paid, for the five years from April 1, 1931, to March 31, 1936. That question turns solely on the provisions of s. 12, sub-s. 5, of the Act which provides as follows : "Where the effect of any "information given under sub-s. 2 of this section"—that is information regarding alterations in the valuation roll and so forth—"is that any premises previously treated by the "authority as being a railway hereditament, or part of a "railway hereditament, have ceased to be so treated, such "amendments may be made of any valuation list (including "any valuation list which has ceased to be in force since the "date as from which under the provisions of this sub-section "the amendments are to have effect) by way of proposal . . . . "as are necessary to secure that those premises and correct "values and particulars in respect thereof appear in the "appropriate part of the valuation list." The local valuation authority, therefore, are to make such amendments in the valuation list as will give effect to the transfer from the railway valuation roll to the valuation list of any such hereditament as the one in question which has been treated as being a railway hereditament during a past period, but is now to be treated as not a railway hereditament. The material words of the second paragraph of sub-s. 5 are as follows: "For "the purposes of the liability of any person to rates, an amendment made under this sub-section shall in relation to any rate "have effect . . . . as from the commencement of the quinquennial period." The question which we are asked to decide is what quinquennial period is there referred to. Mr. Hughes, for the respondents, says that the quinquennial period referred to is that in force at the time when the amendment is made. Mr. Squibb, for the rating authority, says that the date when the amendment is made is immaterial, since liability to pay rates must depend, not on a date when somebody does something or other, but on the date of the liability to pay the rates, and he, accordingly, submits that the quinquennial period referred to in the sub-section must be the quinquennial period to which the amendment relates—in the present case from 1931 to 1936. I think it only necessary to say that it seems to me that this case is a very plain one and that the only reasonable meaning that can be given to the words "the quinquennial period" is that contended for by Mr. Squibb and that they refer to the period which is affected by the amendment and not to the date when the amendment is made. For that reason my opinion is that this appeal ought to be allowed.

TUCKER J. I agree, and also that the question involved is a very clear one. It appears that the necessary alterations were made in the valuation lists to make them conform with the result of the revised first railway valuation roll, and I think that it is abundantly clear from the sections of the Act which have been referred to that the "quinquennial period" referred to in s. 12, sub-s. 5, of the Act is the period affected by the amendment, namely, the first quinquennial period under the Act.

STABLE J. I agree. Up to the coming into operation of the Act of 1930 railway property was rated parish by parish. That Act altered the law and created a statutory body to re-value railway property. The railway rating authority took some time to prepare the roll which was not "revised"—which word means under the Act "put into operation"—until July, 1937. The authority had by then decided that some of the properties which hitherto had been rated as railway property were not railway hereditaments under the Act of 1930 because of the proviso in s. 1, sub-s. 3, that "no premises . . . . so let out as to be capable of "separate assessment, shall be deemed to be, or to form "part of, a railway hereditament," and therefore were excluded from the valuation made by the railway rating authority, and so fell to be dealt with in the ordinary valuation list. The provisions of s. 12, sub-s. 5, of the Act of 1930 then came into operation. [His Lordship read the sub-section.] The sole question is: What is the "quinquennial period" there mentioned? Is it the period in relation to which the rate is made, or is it a quinquennial period which has no relation to the rate except that the date on which the amendment is made by mere chance happens to fall within it. The answer seems to me to be plain. The amended valuation list is complementary to the valuation roll. The valuation roll deals with the quinquennial period from 1931 to 1936 and the amended valuation list, which contains amendments consequential on the revision of the valuation roll, must deal with precisely the same period. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Vizard, Oldham, Crowder & Cash, for Phillips & Creswick, Chippenham.*

Solicitors for respondents: *Titley, Long & Co., Bath.*

W. L. L. B.

C. A.

1941
May 12.

WOOD *v.* LONDON COUNTY COUNCIL.

[1940. W. 598.]

Factory Acts—"Factory"—Kitchen—Premises belonging to public authority—Preparation of food for patients and staff at hospital—Accident—Electrically operated mincing machine—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14; *s.* 151, *sub-s.* 1 (*a*), (*b*), *sub-s.* 9.

While the plaintiff, a kitchen-maid employed by the defendants, a public authority, was mincing meat with an electrically operated mincing machine in the kitchen of a hospital belonging to the defendants, the minced meat being intended for consumption on the premises by the patients at and/or the staff of the hospital, her hand was caught in the machine and she was injured:—

Held, that the kitchen was not "a factory" within s. 151, sub-s. 1, paras. (*a*) and (*b*), and sub-s. 9, of the Factories Act, 1937, and, therefore, that the defendants were under no obligation under s. 14 of the Act to fence securely any dangerous machinery therein.

Decision of Tucker J. [1940] 2 K. B. 642 reversed on this point.

APPEAL from Tucker J. (1).

In September, 1939, the plaintiff, Marjory Wood, was a kitchen-maid employed by the defendants, the London County Council, at Bexley Mental Hospital, which belonged to them and where there were some two thousand patients and a staff of about three hundred persons. While the plaintiff was mincing corned beef with an electrically operated mincing machine in the kitchen of the hospital, her hand was caught in the machine and she was injured. The minced meat was intended, not for sale, but for consumption on the premises by the patients at and/or the staff of the hospital. The plaintiff brought this action against the defendants, alleging that her injury was due to the negligence of the defendants or their servants, or, alternatively, to the breach by them of the duty laid on them by s. 14 of the Factories Act, 1937, to fence the machine, it being "dangerous machinery" within that section, and the kitchen being a "factory" within s. 151, sub-s. 1, of the Act. The defendants denied that they had been guilty of negligence or of breach of statutory duty, and they further pleaded that the plaintiff had been guilty of contributory negligence. Tucker J. held that the effect of s. 151, sub-s. 9, of the Factories Act, 1937 (1), was that whereas, in a normal case, for premises to be a "factory" within the meaning of the Act, it was essential that the work carried on thereat should be carried on by way of trade or for purposes of gain, that was not so when the premises belonged to or were in the occupation of a public authority; that the hospital constituted "premises in which . . . . persons are employed in "manual labour in any process for or incidental to . . . . (*a*) "the making of any article [i.e. mince] . . . . or (*b*) the "altering . . . . of any article [i.e. corned beef]" and was, therefore, a "factory" within s. 151, sub-s. 1 (*a*), (*b*); and that the machine was dangerous and was not securely fenced as required by s. 14 of the Act; but he dismissed the action on the ground that the plaintiff had been guilty of contributory negligence.

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(1) [1940] 2 K. B. 642.

The plaintiff appealed. The appeal is only reported on the question raised by way of answer to the plaintiff's appeal whether the kitchen was a "factory" within the meaning of the Act.

Paull K.C. and *Edgedale* (for *Armstrong-Jones*, on war service) for the plaintiff, said that, as Tucker J. had decided in favour of the plaintiff on every point but that of contributory negligence, he would limit his argument in opening the appeal to that matter.

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(1) By Factories Act, 1937, s. 151, sub-s. 1: "Subject to the "provisions of this section, the "expression 'factory' means any "premises in which . . . . persons "are employed in manual labour "in any process for or incidental "to any of the following purposes, "namely:—(*a*) the making of any "article or of part of any article; "or (*b*) the altering, repairing, "ornamenting, finishing, cleaning, "or washing, or the breaking up "or demolition of any article . . . . "being premises in which . . . . "the work is carried on by way "of trade or for purposes of gain "and to or over which the em- "ployer of the persons employed "therein has the right of access "or control. . . ."

By sub-s. 9: "Any premises "belonging to or in the occupa- "tion of . . . . any municipal or "other public authority shall not "be deemed not to be a factory ". . . . by reason only that the "work carried on thereat is not "carried on by way of trade or "for purposes of gain."

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Beresford K.C. and *Monier-Williams* for the defendants. If this kitchen is not a "factory" on the true construction of the Factories Act, 1937, the plaintiff's case fails. A lunatic asylum may be described as a "whole time business," but, if the kitchen at an asylum is a "factory" within the Act the following matters automatically follow: (1.) all safety regulations must be observed; (2.) the statutory notice required by s. 72 must be kept in the kitchen and the prescribed records and accident book (see s. 116); (3.) the rules restricting the hours of employment of women and young persons would apply, and under s. 70 the hours would be limited to forty-eight hours a week and the work must not begin before 7 A.M. and must not continue beyond 6 P.M. on ordinary weekdays and 1 P.M. on Saturdays. Also, work must cease during meal times, and all holidays, including Sundays, must be recognized (ss. 77 and 78). That is what the decision of Tucker J. implies. It is difficult to imagine anything more ridiculous. The same considerations would apply also to the kitchen of every restaurant and hotel. If any result so far-reaching had been intended by the legislature, it would have been made clear in the Act: compare s. 151, sub-s. 5, which makes such an ancillary thing as a laundry a "factory." Sect. 151, sub-s. 1, has been wrongly construed. What has to be considered is the purpose, and that means the primary purpose of the premises: *Bailey* v. *Potteries Electric Traction Co., etc.* (1); *Cardiff Revenue Officer* v. *Cardiff Assessment Committee* (2); *Moore* v. *London County Council* (3). The primary purpose of the kitchen of a hospital is to provide meals for the patients and staff and not to make a specific article of food or to alter the character of the ingredients thereof. That being the position, it is immaterial to consider whether corned beef is an article which was being altered in the mincing machine. The nearest case to the present is *Nash* v. *Hollinshead* (4) where an accident occurred on a farm and for the workman to recover it had to be shown that he was employed at a "factory." Sect. 151 of the Act of 1937 must be given some limitation in

(1) [1931] 1 K. B. 385, 485, 499.
(2) [1931] 1 K. B. 47, 66.
(3) [1931] A. C. 151, 158.
(4) [1901] 1 Q. B. 700.

its meaning and that is best done by having regard to the primary object of the premises said to be a "factory." If the kitchen here is not a "factory," the defendants are under no obligation to fence dangerous machines, but in any case there was clearly contributory negligence.

Paull K.C. in reply. The wording of s. 151 of the Factories Act, 1937, shows conclusively that the defendants' kitchen is a "factory," being a place where persons are employed on manual labour and articles are made or altered, and, it being unnecessary, by sub-s. 9, that the work should be carried on by way of trade or for purposes of gain.

[MacKinnon L.J. If this is a "factory," the general conditions as to employment of women and young persons in s. 70 would apply.] That difficulty is met by s. 73 which permits payment for overtime. [Stable J. That is only for a limited time in each year.] The difficulty can be overcome by working in shifts. But difficulties of this kind are not material. All that concerns the court is whether the kitchen where the plaintiff was working is a "factory" within the definition in s. 151 and the words of the section clearly cover the case. It has been said that regard must be had to the primary purpose of the premises only and as authority for this *Bailey* v. *Potteries Electric Traction Co., etc.* (1) is relied on. But that is a case where a special definition of "factory" applied which imported a condition as to the primary object under the proviso to s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. Further, in *Nash* v. *Hollinshead* (2) the material definition of "factory" in the Factory and Workshop Act, 1878, was in narrower terms than that in s. 151 of the Act of 1937, and the real decision was that farms were not mentioned in the schedule. In the Act of 1937 all that has been swept away and the definition of "factory" made far wider. However absurd the result, it has to be applied. [He also referred to *Fullers* v. *Squire* (3).]

MacKinnon L.J. [after stating the facts:] It is contended

(1) [1931] 1 K. B. 385.
(2) [1901] 1 Q. B. 700.
(3) [1901] 2 K. B. 209.

that this kitchen was a "factory" within the definition in s. 151, sub-s. 1, of the Factories Act, 1937. The sidenote to that section is: "Interpretation of expression 'Factory.'" [His Lordship read the material parts of sub-ss. 1 and 9.] It is said that the plaintiff was employed in manual labour and that is true. Next, it is said that she was employed in manual labour in a process for or incidental to one of the purposes mentioned in s. 151, sub-s. 1 (*b*), and I think the principal thing relied on is "the breaking up or demolition "of any article." It was also said that the subsequent words of sub-s. 1 about the need of the work being carried on for purposes of trade or gain were rendered inapplicable because these premises were in the occupation of the London County Council, and, therefore, within s. 151, sub-s. 9.

After those extraordinarily general words in the first part of s. 151, the section goes on: "and (whether or not they are "factories by reason of the foregoing definition) the expression 'factory' also includes the following premises in which "persons are employed in manual labour, that is to say . . . ." Then there is a long list of thirteen different types of premises in which various processes are being carried on. It is not, I think, without importance to observe that, among those thirteen specific types of premises, the fifth is "any laundry "carried on as ancillary to another business, or incidentally "to the purposes of any public institution." There is, therefore, no doubt that the laundry attached to this mental hospital would be a "factory" as coming within that provision. Whether it would also be a "factory" within the general words at the beginning of sub-s. 1, because the persons there are employed in manual labour in any process for or incidental to the washing of any article, is perhaps a much more difficult question. Also it is not, I think, without importance to observe that if this kitchen is a "factory" all the provisions of the Factories Act, 1937, would have to apply to it. It is not necessary to refer to all of them, but by way of example I may point out that by s. 70, which is under the headings "Hours and holidays" and "Employment "of women and young persons," it is provided that the period of employment shall not exceed eleven hours in any day, and shall not begin earlier than seven o'clock in the morning, nor end later than six o'clock in the evening, or, on Saturday, one o'clock in the afternoon. Those are provisions which I should think it would be quite impossible to apply to the work being carried on in the kitchen of this asylum, in particular the provision that no work shall be done earlier than 7 A.M. or after 6 P.M. Then, by s. 72, if this kitchen is a "factory," the County Council would be bound to display in it a formal notice providing various things about the periods of employment and the intervals for meals and rest and that sort of thing. If they did not put up such a notice, under s. 131, apparently, they would be liable to a penalty not exceeding 20*l*. Still more remarkable, if this kitchen was a "factory," is the effect of s. 77 which provides "Subject to the "special exceptions allowed under this part of this Act, a "woman or young person shall not be employed on Sunday "in a factory." The special exceptions to which the section refers are contained in s. 91, which provides, "Where the "occupier of a factory is a person of the Jewish religion, or a "member of any religious body regularly observing the "Jewish sabbath, a woman or young person who is a person "of the Jewish religion or a member of such a religious body "as aforesaid may be employed on Sunday, subject to the "condition that the factory must be closed on Saturday and "must not be open for business on Sunday."

Those are some of the extraordinary results which follow if this kitchen is a "factory," quite apart from one's surprise, from the point of view of common sense, that an ordinary kitchen (although, no doubt, a kitchen on a very considerable scale, because there are over two thousand people to cook for) could be within the definition of a factory at all. Mr. Paull was quite consistent in his argument, because he did not shrink from agreeing to my suggestion that, if this was a little cottage hospital, conducted by some rural district council with perhaps two people in its small kitchen, those premises would be a "factory," for there would be persons employed in manual labour in a process incidental to one of the following

MacKinnon L.J.

purposes, namely, the washing of an article, that is to say, the ordinary washing up of the few plates and dishes used in the hospital. I fully recognize that, in construing an Act, one is not to be deflected from giving it its proper meaning by looking at the absurd lengths to which the definition may drive one, but I do not think it is improper to take into account the whole nature of these premises and the nature of the work that is going on in them. In my view, a kitchen is not within this definition of a "factory" because dishes are washed up in it or because articles are altered, finished or cleaned in it, or because articles are ornamented, as, for instance, by providing icing sugar on a cake or parsley as a garniture for dishes. A kitchen which is carried on in a large way by people running a restaurant by way of trade or for purposes of gain would not, by reason of those words, become a factory within that section.

If that be so, this appeal fails on the first point, but I think it would have been sufficient ground for its dismissal that, even assuming that Tucker J. was right in saying that this was a "factory" and that this machinery was not securely fenced, he was also right in holding that the accident occurred owing to the contributory negligence of the plaintiff. [His Lordship dealt with the facts on this issue and concluded :] On both these grounds I think this appeal fails and should be dismissed with costs.

Luxmoore L.J. I agree.

Stable J. I agree.

Appeal dismissed.

Solicitor for plaintiff : *W. H. Thompson.*
Solicitor for defendants : *J. R. Howard Roberts.*

H. C. G.

In re AMAND.

1941
March 31;
April 22,
23, 24;
May 23.

Conflict of laws—Territory of allied foreign power occupied by enemy—Queen of Netherlands and her Ministers in United Kingdom—Dutch States-General and Council of State in territory occupied by enemy—Recognition by His Majesty's government of Dutch queen as competent to carry out functions appertaining to government of Netherlands—Dutch royal decree—Validity—Proof—Question of fact—Conscription of Netherlands subject living in United Kingdom—Arrest as deserter—Allied Forces Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 51), *ss.* 1, 3—*Allied Forces* (*Application of* 23 *Geo.* 5, *c.* 6) (*No.* 1) *Order,* 1940 (*St. R. & O.*, 1940, *No.* 1818).

The invasion by Germany of the Netherlands in May, 1940, resulted in the transfer of the Queen of the Netherlands and her responsible Ministers to the United Kingdom, but both Houses of the Dutch States-General and the Council of State remained in the Netherlands on territory occupied by and in the power of Germany, the enemy of both the United Kingdom and of the Netherlands. On August 8, 1940, a decree was made by the Queen of the Netherlands upon the presentation of the Dutch Minister of Defence and signed by the Minister of Justice, imposing compulsory military service upon all Dutch subjects of a certain age residing in the United Kingdom, in the United States of North America and in Canada. In accordance with the terms of that decree the applicant was called upon to report for military service at a place in the United Kingdom, and he did so under protest. In February, 1941, he was given a week's leave, but he did not return at its expiration, and he was subsequently arrested by the Metropolitan police, under the powers conferred by the Allied Forces Act, 1940, and an Order in Council made under that Act, as being a deserter from the Netherlands army. Upon the hearing of an application by the applicant for habeas corpus the court was informed by the Attorney-General that the government of the Netherlands was a government for the time being allied with His Majesty and established in the United Kingdom; that it was exercising its functions in the United Kingdom with the assent and on the invitation of His Majesty's government in the United Kingdom, and that His Majesty's government recognized Queen Wilhelmina and her government as the sovereign and government of the Netherlands and competent to carry out the legislative, administrative and other functions appertaining to the sovereign and government of the Netherlands. The court held that the applicant did not become a member of the Netherlands military forces by voluntary enlistment, but had been conscripted under the Dutch royal decree. A contention was put forward on behalf of the Dutch Minister of Defence that the mere production of the Dutch royal decree as a legislative act of the Netherlands government was conclusive of its validity in Netherlands law

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and that no evidence was required. Evidence, contained in affidavits sworn by Dutch lawyers, was, however, put forward on behalf of the Dutch Minister of Defence to prove that the decree was a valid decree, and that when a state of emergency arose the constitution did not apply first and foremost but the vital interests of the State and people. It was contended on behalf of the applicant that, even if the decree was valid, it was not enough to find that he was a member of the Dutch military forces according to Dutch law, but that he must also be a member according to the law of the United Kingdom:—

Held, that the legislative act of a foreign power did not prove itself, like an Act of Parliament of the United Kingdom but that evidence was required to prove as a question of fact, what was the foreign law; that on the evidence of the Dutch lawyers the Royal decree of August, 1940, was a valid decree according to Netherlands law; that there was nothing in the constitution of the Netherlands to make the Dutch law inapplicable to Netherlands subjects outside the kingdom of the Netherlands; that the effect of the royal decree of August 8, 1940, and the calling up notices, was to change the applicant's civilian status to that of a soldier according to the law of the United Kingdom; and that the Allied Forces Act, 1940, and the Order in Council authorized the arrest and detention of the applicant as a deserter.

APPLICATION for a writ of habeas corpus on behalf of Jean Jacques Amand, a Netherlands subject.

Notice of the application was served upon the Home Secretary, the officer commanding the Netherlands Army Camp in the United Kingdom, and the chief officer of the Metropolitan Police at Bow Street.

As a result of the invasion by Germany of the territory of a number of European Governments (including the Netherlands Government), those governments were transferred to this country.

It was stated in court by the Attorney-General that the Government of the Netherlands was a government for the time being allied with His Majesty the King of Great Britain and Northern Ireland and established in the United Kingdom; that it was established and exercised its functions in the United Kingdom with the assent and on the invitation of His Majesty's Government in the United Kingdom, and that His Majesty's Government recognized Her Majesty Queen Wilhelmina and her Government as the Sovereign and Government of the Netherlands and as exclusively competent to carry out the legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands.

The Netherlands Government desired to organize naval, military and air forces within the United Kingdom, and it became necessary to make arrangements for the discipline of these forces.

On August 22, 1940, the Allied Forces Act, 1940, received the Royal assent. This Act empowered His Majesty to provide by Order in Council for the application with modifications and adaptations and exceptions of a number of the provisions contained in the Visiting Forces (British Commonwealth) Act, 1933, to the military forces of any Power allied with His Majesty which were for the time being present in the United Kingdom. By s. 1 of the Act the military courts and authorities of any foreign Power allied with His Majesty were authorized to exercise within the United Kingdom in relation to members of the same forces in matters concerning discipline all such powers as were conferred upon them by the law of that Power.

An Order in Council—the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940—was made on October 11, 1940, applying certain parts of the Visiting Forces (British Commonwealth) Act, 1933, with adaptations and modifications to the military forces of the Netherlands. Among other provisions that were made applicable to the military forces of the Netherlands, it was provided that s. 154 of the Army Act, which related to the apprehension of deserters and absentees without leave from a home military force, should, within the United Kingdom, apply in relation to a deserter or absentee without leave from a Netherlands force.

The following statement of facts is taken from the judgment of the Lord Chief Justice: The applicant had lived in the United Kingdom for a number of years. He is a director of the Strand Bulb Stores, Ld., which carries on business in London. He is also interested in two other businesses. After the invasion of Holland by the German army he became aware, as the result of a wireless message broadcast by the British Broadcasting Corporation and by a notice appearing in the Press, that all Netherlands subjects living in England were requested to send their particulars to the Netherlands Consul in London. He did this, and about the middle of July, 1940, he underwent a medical examination at the request of the Netherlands authorities. He was informed that this was for purposes connected with the Netherlands army. On August 8 a decree was published in the official Gazette of the Kingdom of the Netherlands concerning compulsory military service of Netherlands subjects residing in the United Kingdom, in the United States of North America and in Canada This decree was made by the Queen of the Netherlands upon the presentation of the Minister of Defence and was signed by the Minister of Justice on August 14, 1940. By the decree all Netherlands subjects of a certain age living in the above-mentioned territories were required, if not serving already with the army or navy, to register for military service according to the regulations to be made by the Minister of Defence. By art. 1 (2.) any person who failed to comply with these regulations was made liable to prosecution under art. 46 of the Conscription Act. By art. 5 the Minister of Defence might make provisions concerning the calling up of persons designated as ordinary conscripts by art. 3. On or about August 9, and again on or about August 16, the applicant received written directions or calling up notices from the Netherlands Ministry of Defence ordering him to report to Porthcawl on August 20 and to meet the Netherlands officer in charge of the Netherlands conscripts at Paddington. After interviewing the Netherlands authorities and having been informed that he had to join the Netherlands army and having protested against a refusal to postpone his calling up, for the purpose of attending to his business affairs, the applicant reported at Paddington on the day appointed and went to a Netherlands army camp at Porthcawl. He again asked for leave to put his business in order and this was again refused. After about a fortnight at Porthcawl he was moved to another camp where he met with a motor accident after which he was given sick leave until January 3, 1941. He duly reported at the new headquarters of the Netherlands army and stayed there until January 30 when he was given a week's leave. At the end of the seven days he asked the commanding officer in writing for a further period of leave to attend to his business but he received a telegram directing him to return immediately. He was next interviewed by a police sergeant from Bow Street police station and requested to return immediately to the Netherlands army camp. He gave a promise, as he says in ignorance of his legal position, to return to the camp, but he did not do so and after further meetings and discussions with the police authorities at Bow Street he was arrested by the police on March 14 as a deserter. The applicant at no time signed any document expressing any willingness to join or acknowledging that he had joined the Netherlands forces nor had he sworn any oath of allegiance to the Netherlands Government or to the Queen of the Netherlands. It seems probable that the protests of the applicant were directed to the refusal of his applications for leave in order to put his business in order, inasmuch as it is stated by Captain Hendrickx, a captain of the Royal Netherlands army, that the applicant at no time between August 21, 1940, and January 30, 1941, made any protest against being compelled to join the Netherlands army. One further fact was stated in the course of the argument, namely, that the applicant drew not only pay for himself but also allowances for his family from the time of his obeying the summons to report at Porthcawl.

G. O. Slade for the applicant. The police were only authorized to arrest the applicant as a deserter under the Allied Forces Act, 1940, the Visiting Forces (British Commonwealth) Act, 1933, and the Order in Council made under the 1940 Act applying the 1933 Act to the military forces of the Netherlands, if the applicant was a member of the Dutch military, naval or air forces. It is suggested that the applicant, who has carried on business in London for the last thirteen years, has been made amenable to Dutch military law either by virtue of a decree of the Queen of the Netherlands dated August 8, 1940, or by voluntarily reporting for service. The decree of the Queen of the Netherlands was made fourteen days before the Allied Forces Act, 1940, which gave it effect, if it has any effect, received the Royal assent. According to the affidavit of Dr. Bisschop the decree of August 8, 1940, is invalid according to Dutch law as the Dutch sovereign cannot issue a decree when outside the territory of the Netherlands and this decree was issued by Queen Wilhelmina from London. There is a great difference between a decree and an Order in Council. A decree made by a Dutch sovereign, like any other measure of government, must be made by an Order in Council. Decrees can only take effect in Holland, and it cannot have any extra territorial effect. A decree by itself has no effect at all ; it derives all its efficacy from a statute. The Queen of the Netherlands has no power according to the constitution to legislate on conscription even within Dutch territory and with the assistance of the Dutch Privy Council. Under art. 182 of the constitution, legislation on conscription can only be done by statute. In no circumstances can a Dutch subject be compelled to serve in the Dutch military forces outside the territory of the Netherlands except with his own consent. A Dutch statute is only binding in Holland unless it expressly provides that it is to operate outside Holland. The decree of August 8, 1940, is invalid as it purports to impose sanctions for a breach of the decree and it is provided by art. 55 of the written constitution that penalties must be sanctioned by the Dutch Parliament. The only Dutch statute dealing with conscription is the Conscription Act of 1922, and that statute only deals with conscription inside Holland.

Even assuming that the decree is valid according to Dutch law still it is invalid according to English law. The King in Parliament is the sole body capable of legislating on English soil and for English territory : see the article in the Law Quarterly Review for January, 1941, entitled "The municipal effect of "belligerent occupation." Queen Wilhelmina is recognized by the British Government as the de jure sovereign of the Netherlands, but His Majesty the King cannot confer any jurisdiction upon Queen Wilhelmina to legislate while living in this country except with the consent of Parliament. She cannot alter the laws of Holland during her residence in this country while Holland is in the occupation of the Germans. She can only alter those laws with the assistance of the Dutch Privy Council. No consent of the King without the co-operation of the British Parliament can confer any authority upon the Dutch Queen to legislate while living in this country. An extradition treaty is not valid until it has been sanctioned by Parliament. In *The Parlement Belge* (1), where the question was whether the Crown had power without the authority of parliament by treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, Sir Robert Phillimore said (2): "This is a use of the treaty "making prerogative of the Crown which I believe to be "without precedent, and in principle contrary to the law of "the constitution." The decision of Sir Robert Phillimore was reversed in the Court of Appeal (3) on a different point but the dictum quoted above is still quoted as an authority. A Dutch decree is purely an executive act and cannot be a legislative act; it derives its force either from a statute or an Order in Council. It may be contended that as Amand submitted to the calling up notice he had voluntarily become a member of the Dutch army, but a transfer from being amenable to the civil law to being amenable to military law is a change of status and a change of status cannot take place by conduct.

Le Quesne K.C. and *G. B. McClure* for the Dutch Minister of Defence. The decree of August 8, 1940, was authorized by the Queen of the Netherlands and the two ministers named in the document. Its validity is a question of Dutch law, but its applicability is a matter for the English courts. On that question Dutch law is to be applied as this case comes within the Allied Forces Act, 1940, and the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940 (St. R. & O., 1940, No. 1818). In the contention of the Dutch military authorities Amand is a member of the Dutch military forces, having become so on August 19, 1940, for the purpose of cl. 3 of the order. This decree is not a general measure of the Netherlands Government which has to be passed in the Dutch States-General. In time of war the Queen of the Netherlands has power to legislate outside the four corners of the constitution. This right is inherent in the Dutch sovereign so that she may take proper measures in case of an emergency. In so far as the written constitution of the Netherlands provides to the contrary, it is dealing with statutes and general measures of government, and not with decrees. Thus while the Queen of the Netherlands is empowered to act constitutionally by consulting with the Council of State, she can in an emergency issue decrees without consultation. These are emergency events and the form of the legislation is not vital as in the case of a general measure of government. The authority of the Queen of the Netherlands is recognized in the United Kingdom as being that of the de jure government, and the validity of this decree, if it applies, cannot be impugned: *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1). As to the validity of the decree the evidence before the court is ample to show that Amand is a member of the Dutch military forces. As to the enforceability of the decree, Amand is actually in the Dutch army, and has in fact enrolled himself. He is therefore technically a deserter therefrom, not having returned at the expiration of his leave. The question whether Amand is a member of the Dutch military forces is purely a question of Dutch law. It is suggested that by English law he is not a member because it is said that he was misled by the Dutch authorities in that the notice served upon him did not state that the penalty for disobedience of the conscription law could not be enforced in this country. But that fact cannot invalidate the notice of conscription which has been served upon him. The government of the Netherlands has jurisdiction over its own subjects in this country, but that jurisdiction can only be enforced by virtue of some provision of the English law, which is to be found in the Allied Forces Act, 1940, s. 1, and the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940, para. 1, Schedule para. 3, (2.).

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(1) (1879) 4 P. D. 129.

(2) Ibid. 154.

(3) (1880) 5 P. D. 197.

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(1) [1921] 3 K. B. 532.

Sir Donald Somervell A.-G. and *Hon. H. L. Parker* for the Crown. Assuming that the applicant is a member of the Dutch army the Dutch Government is given power to exercise disciplinary jurisdiction over him, including the right of arrest for desertion, by s. 1 of the Allied Forces Act, 1940, and by the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940, para. 1, Schedule para. 3 (2.). It is admitted that all the conditions of those enactments were complied with, therefore the only question is whether the applicant was a member of the Dutch army, and that must depend upon Dutch law. Any state can, of course, legislate for its own territory and for its own subjects wherever they may be, and there is sufficient evidence here that the conscription decree was valid according to Dutch law, without it being necessary for the court to make further inquiry. It is suggested that the applicant was misled because the conscription notice did not inform him that the penalty for disobedience could not be enforced against him in this country, as no doubt it could not on August 9. But in any event that would not invalidate the notice, and in fact the applicant joined the Dutch military forces without protest and accepted the position, asking for leave of absence in the usual way and so recognizing his status as a Dutch soldier. There is such a thing as a willing conscript. Where a decree of this kind is put forward by a foreign government being on the face of it a legislative instrument, the court will accept it as valid.

Geoffrey Howard for the chief officer of the Metropolitan police at Bow Street.

G. O. Slade in reply. The decree in order to avail the Crown must be valid according to both Dutch and English law, and unless the requirements of both laws are satisfied the applicant never became a member of the Dutch military forces. The weight of the Dutch expert legal evidence in this case shows that the Queen of the Netherlands had no power to conscript a Dutch subject into the Dutch army except with the concurrence of her parliament, which in this case she did not have. With regard to English law it is stated in Oppenheim's International Law, 5th ed., vol. i., p. 266, para. 145 (note 7):

"States as a rule refuse to give effect within their own territory "to the public law, as distinguished from private law, of foreign "States." The only person who can affect the status of anyone in this country is the King in Parliament. Scrutton L.J. said in *Princess Paley Olga* v. *Weisz* (1) that "Every sovereign State "is bound to respect the independence of every other sovereign "State, and the courts of one country will not sit in judgment "on the acts of another done within its own territory." But the decree in the present case was not made within the territory of the Kingdom of the Netherlands. Sect. 80 of the Army Act contains the requirements which must be complied with in order that a recruit to the English army may be validly enlisted. These show that the enlistment must be a voluntary act on the part of the recruit. The proceedings in the present case were very different. A written constitution cannot be altered except by constitutional methods. If the whole of the Netherlands is in enemy occupation there is no territory in which a Dutch law can be published. The capital of the Netherlands cannot be transferred out of Holland. The Queen of the Netherlands cannot do by a decree what according to the constitution is required to be done by legislation. A Dutch decree has no force in this country. A foreign state has only power to deal with its subjects and property in its own country. It was held in *A. M. Luther* v. *Sagor & Co.* (2) that the courts of this country will not interfere with the decrees of a foreign state dealing with subjects and property in its own country. Hill J. held in *The Jupiter* (*No.* 3) (3) that with regard to transfer of property ships were to be governed by the same principles as were applicable to other chattels and that the decrees of the R.S.F.S.R. could not operate to transfer property which was outside the territory of the R.S.F.S.R. That decision was approved by the Court of Appeal: see the judgment of Lawrence L.J. (4). The Dutch sovereign has no authority to legislate in the United Kingdom for Dutch subjects who are in the United Kingdom. It is stated in Dicey's Law of the Constitution, 9th ed. (1939), p. 70: "There is no power

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(1) [1929] 1 K. B. 718, 725.

(2) [1921] 3 K. B. 532.

(3) [1027] P. 122, 144.

(4) Ibid. 250, 255.

"which, under the English constitution, can come into "rivalry with the legislative sovereignty of Parliament." The law of nations recognizes the right of a foreign sovereign to legislate for his subjects wherever they may be, but that legislation cannot be enforced except in his own territory. But the law of nations does not recognize the right of a foreign sovereign to legislate in regard to property which is outside his jurisdiction. The Queen of the Netherlands cannot by a decree alter the status of a Dutch subject while in this country. If the decree is valid the whole of the argument on the other side proceeds upon the basis that Amand was conscripted and any question of voluntary enlistment disappears. A person is enlisted either by voluntary enlistment or by a decree dispensing with the requirements of ordinary enlistment. Enlistment implies going through certain ceremonies, but no amount of consent will be sufficient unless the requirements of enlistment are complied with. A conscript is a person who is deemed to have been enlisted. It would be a travesty of the facts to suggest in this case that Amand was a willing volunteer. There was no willing consent by him: it was overshadowed by threats.

1941. May 23. VISCOUNT CALDECOTE C.J. read the following judgment: This is an application for a writ of habeas corpus on behalf of Jean Jacques Amand, a Netherlands subject. Notice of the application was served upon the Home Secretary, the officer commanding the Netherlands army camp in the United Kingdom, and the chief officer of the Metropolitan police at Bow Street. The applicant has lived in the United Kingdom for a number of years. On March 14, 1941, he was arrested and detained in custody for the purpose of being handed over to the Netherlands military authorities as a deserter from the Netherlands army. He is now on bail, but this makes no difference and we have to deal with the application as if he were still detained in custody. To justify his detention on British soil authority must be found in the law of this country, and the applicant's arrest and detention are, accordingly, said to be warranted by the Allied Forces

Act, 1940, and an Order in Council made under that Act. As everyone knows, the invasion by Germany of the territory of a number of European Governments resulted in the transfer of those Governments, amongst them the Netherlands Government, to this country. We are informed by the Attorney-General that the Government of the Netherlands is a government for the time being allied with His Majesty and established in the United Kingdom; that it is established and exercising its functions in the United Kingdom with the assent and on the invitation of His Majesty's Government in the United Kingdom, and that His Majesty's Government recognize Her Majesty Queen Wilhelmina and her Government as the Sovereign and Government of the Netherlands and as exclusively competent to perform the legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands. The Netherlands Government which was thus recognized by His Majesty's Government desired to organize naval, military and air forces within the United Kingdom, and it became necessary to make arrangements for the discipline of these forces. There was already in existence an Act of Parliament entitled Visiting Forces (British Commonwealth) Act, 1933, to make provision with respect to forces of His Majesty from other parts of the British Commonwealth when visiting the United Kingdom. Advantage was taken of this Act by the Allied Forces Act, 1940, which empowered His Majesty to provide by Order in Council for the application with modifications and adaptations and exceptions of a number of provisions contained in the Visiting Forces (British Commonwealth) Act, 1933, to the military forces of any Power allied with His Majesty which are for the time being present in the United Kingdom. By the same Act (s. 1) the military courts and authorities of any foreign Power allied with His Majesty are authorized to exercise within the United Kingdom in relation to members of the same forces in matters concerning discipline all such powers as are conferred upon them by the law of that Power. In exercise of these powers an Order in Council was in due course made on October 11, 1940, applying certain parts of the

Visiting Forces Act, 1933, with adaptations and modifications to the military forces of the Netherlands. Amongst other provisions thus made applicable to the military forces of the Netherlands it was provided that s. 154 of the Army Act (which relates to the apprehension of deserters and absentees without leave from a home military force) should, within the United Kingdom, apply in relation to a deserter or absentee without leave from a Netherlands force. In arresting the applicant the police authorities acted in pursuance of these powers, and it is admitted that all conditions required by the schedule to the Order in Council or otherwise were satisfied so as to entitle the police to arrest the applicant. The sole question for our determination is whether the applicant was at the time of his arrest a member of the Netherlands military forces. If he was, it is not suggested that this application can succeed. In order to determine this question it is necessary to set out the facts in some detail. [His Lordship then stated the facts set out above, and continued :] It is clear to my mind that the applicant was not a member of the Netherlands forces by what may be called voluntary enlistment. If he became a member of the Netherlands forces it was because he was summoned to comply with the royal decree. It is true that he wore uniform and accepted the discipline of the Netherlands army by applying for leave and in every other way except in absenting himself without leave, and he took advantage of the provision made by the Netherlands authorities for his wife. He seems to have obeyed the summons believing he had no other choice. It is for this reason that I take the view that the applicant did not by voluntary enrolment become a member of the Netherlands military forces.

This, however, is far from disposing of the case, and it becomes necessary to inquire into the effect of the decree and calling up notices of August 9 and 16. The Allied Forces Act did not receive the Royal assent until August 22. Therefore, when the applicant received the calling up notices on August 8 and 16, no means existed according to the law of the United Kingdom by which any compulsion could have been applied to him to become a member of the Netherlands forces. Still he may have become a member by virtue of the decree and calling up notices, especially when these are taken in conjunction with the facts that I have mentioned as to his actual service in the Army. The Attorney-General's statement to the court establishes the fact that Queen Wilhelmina and her Government are recognized by His Majesty's Government as the de jure Sovereign Government of the Netherlands. That Government, however, did not thereby acquire any powers over Netherlands subjects not otherwise possessed by it according to Netherlands law. We have to look further than the Attorney-General's statement to enable the court to say whether or not the decree was valid and what its effect was. According to the argument for the Netherlands Minister of Defence, no evidence is required, and the mere production of the decree is conclusive as to its validity in Netherlands law. In support of this proposition Mr. Le Quesne relied on a passage from the judgment of Roche J., as he then was, in the case of *A. M. Luther* v. *James Sagor & Co.* (1): "Whether the "decree in question is a valid legislative act which can be "recognized as such by the courts of this country must, in "my judgment, depend upon whether the power from which it "purports to emanate is what it apparently claims to be, a "sovereign power . . . . The proper source of information as to "a foreign power, its status and sovereignty, is the Sovereign "of this country through the Government." In a later passage Roche J. said (2): "If a foreign government is recognized "by the Government of this country the courts of this country "may and must recognize the sovereignty of that foreign "government and the validity of its acts." These statements were made with reference to the validity of acts of the Russian Government in relation to property situated in Russian territory and belonging to a Russian company. Warrington L.J. in the same case in the Court of Appeal made the same point. He said (3): "It is well settled that the validity of the "acts of an independent sovereign government in relation to "property and persons within its jurisdiction cannot be

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(1) [1921] 1 K. B. 456, 473.

(2) Ibid. 474.

(3) [1921] 3 K. B. 532, 548.

"questioned in the courts of this country." Warrington L.J. then quoted the following passage from a judgment in an American case: "Every sovereign state is bound to respect "the independence of every other sovereign state, and the "courts of one country will not sit in judgment on the acts of "the Government of another done within its own territory." (*Oetjen* v. *Central Leather Co.* (1)) The judgments of Scrutton L.J. and Sankey L.J. in *Princess Paley Olga* (2) are to the same effect. These statements, which needless to say I accept, do not support Mr. Le Quesne's proposition. An Act of Parliament of the United Kingdom proves itself and its validity cannot be challenged. This is not so with a legislative act of a foreign Power. Evidence is required to prove what is a question of fact, namely the foreign law. In the very case of *Luther* v. *Sagor* (3) on which Mr. Le Quesne relied, the court could only act and did act upon evidence as to what the law of the Soviet Republic was. Another illustration is to be found in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (4).

Such evidence, however, has been laid before the court in this case. [His Lordship stated and reviewed the evidence of Dr. Bisschop, filed on behalf of the applicant, and that of Dr. de Moor and Dr. Snyders, filed on behalf of the Netherlands Ministry of Defence, upholding the validity of the decree according to the law of the Netherlands, and proceeded:] I have considered with respect Dr. Bisschop's opinion and reasons, but Dr. de Moor and Dr. Snyders speak with great authority and I accept their evidence.

The two witnesses last mentioned express the opinion that there is nothing in the constitution to make Netherlands law inapplicable to Netherlands subjects outside the Kingdom of the Netherlands. Dr. de Moor says it is wrong to deduce from the constitution that the Netherlands legislature cannot pass legislation binding a Netherlands subject who is residing outside the Netherlands. Dr. Snyders even more explicitly declares that there is nothing to prevent Netherland legislation whether under normal or "emergency" powers being applicable according to its terms to Her Majesty's subjects wherever they may be. "It is true," he says, "that such provisions would "not normally be enforceable in foreign countries where "Netherland subjects affected by the law might be. Such "law would, however, be binding on such a subject and could "be enforced against him on his return to the Netherlands."

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(1) (1918) 246 U. S. 297, 303.
(2) [1929] 1 K. B. 725, 728.
(3) [1921] 1 K. B. 456; 3 K. B. 532.
(4) [1925] A. C. 112.

These opinions seem to me to be agreeable to the rules of International Law recognized by writers on that subject. In Dicey's "Conflict of Laws," 5th ed., p. 20, the following statement appears: "A State's authority, in the eyes of "other States and the courts that represent them is, speaking "very generally, coincident with, and limited by, its power. "It is territorial. It may legislate for, and give judgments "affecting things and persons within its territory. It has no "authority to legislate for, or adjudicate upon, things or "persons (unless they are its subjects) not within its territory." See also Oppenheim's International Law, 5th ed., vol. i., p. 507. It goes without saying that no conscription by the law of a foreign Power of the personal services of a person within the United Kingdom can be enforced against him while in this country. "The court has no jurisdiction to entertain an "action for the enforcement either directly or indirectly of a "penal, revenue, or political law of a foreign State." (Dicey, "Conflict of Laws," 5th ed., p. 212.) But that is no reason for holding that a foreign Government cannot by appropriate measures legislate with regard to the duties of its subjects even while they are within the United Kingdom.

I therefore think the decree was valid according to Netherlands law, and that it applied to the applicant while resident in this country.

It was not contended by Mr. Slade that assuming the decree to be valid, its effect together with the calling up notices is not to make the applicant by conscription a member in Netherlands law of the Netherlands army. The decree and notices clearly have that effect. But a further point is taken by Mr. Slade. It is said that it is not enough to find that the applicant is a member of the Netherlands military forces according to

Netherlands law. He must be a member according to the law of this country. This submission can, in my opinion, be answered by asking what law it is that alone can make a man a member of the Military forces of a foreign Power. It must be the law of that Power.

Mr. Slade pressed the view upon us that before the applicant can become a member of the Netherlands army something must have been done to change his civilian status to that of a soldier according to the law of the United Kingdom. That is just what seems to me to have been the effect of the decree of August 8 and the calling up notices, and if the law of this country has declared that a certain code may be enforced against a member of the Netherlands army, that means a member according to Netherlands law.

In the final result I hold that the Allied Forces Act, 1940, and Order in Council authorized the arrest and detention of the applicant as a deserter, and that he may be properly held for the purpose of being handed over to the Netherlands military authorities.

I therefore think the application for a writ of habeas corpus should be refused.

HUMPHREYS J. I agree with the judgment which has just been delivered by the Lord Chief Justice and for the reasons given by him; I have nothing to add.

SINGLETON J. I agree.

Application for writ of habeas corpus refused.

Solicitors for the applicant: *Gisborne & Co.*

Solicitors for the Dutch Minister of Defence: *Stephenson, Harwood & Co.*

Solicitor for the Police: *Solicitor to the Metropolitan Police.*

Solicitor for the Crown: *The Treasury Solicitor.*

R. F. S.

1941
May 21.

THE KING *v.* ELECTRICITY COMMISSIONERS.

Ex parte SOUTH WALES ELECTRIC POWER COMPANY.

Electricity—Electricity Commissioners—Statutory supply company—Increase of capital—Special Order of Commissioners—Conditions attached—Prohibition—Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, *c.* 100), *s.* 1—*South Wales Electric Power Act,* 1932 (22 & 23 *Geo.* 5, *c.* xii.) *ss.* 19, 25.

By s. 19 of their special Act passed in 1932, the South Wales Electric Supply Company, being a statutory supply company, were enabled to increase the authorized capital of the company "to such an extent as may be authorized by a Special Order made "by the Electricity Commissioners and confirmed by the Minister " . . . . ," By s. 25 of the same Act "notwithstanding anything "in the Companies Clauses Consolidation Acts, 1845 to 1889, or the "Companies Clauses Act, 1863" the Company might "in issuing "any unissued portion of the authorized share capital dispose "of all or any of the shares or stock representing such capital at "such times to such persons on such terms and conditions and in "such manner as the directors think advantageous to the "company."

In October, 1940, the company found it necessary to raise further capital and applied for a special order for an increase to the extent of 1,000,000*l*. The Commissioners were prepared to make a special order approving the increase, if the company would undertake "that the promoters would not make any issue of share capital "under the powers conferred by the order except by agreement "between the promoters and the Electricity Commissioners as "to the terms of the issue." The company objected on the ground that the persons responsible for the financial control of the company were the directors, and they applied to the court for an order for prohibition :—

Held, that in seeking to obtain from the company this undertaking the Commissioners were acting ultra vires their powers under the Electricity (Supply) Act, 1919, and were seeking to interfere with the financial control of the company, which was placed in the hands of the directors by the terms of the company's special Act ; and that the company were entitled to the order for prohibition.

Motions by the South Wales Electric Power Company for orders for prohibition and mandamus in the following circumstances :—

The South Wales Electric Power Company were a statutory company, their objects being to supply electricity in bulk to authorized undertakers, and in certain cases to supply power to individual consumers. The company were incorporated by the South Wales Electrical Power Distribution Company Act, 1900. By the South Wales Electric Power Act, 1932, the finances of the company were reorganized, and by s. 14 thereof the company were empowered to raise additional share capital within certain limits. Sect. 16 provided for loan capital, and by s. 19: "The authorized share capital "the authorized loan capital and the amount which may be "raised by the Company under the last preceding section of "this Act may from time to time be further increased to such "extent as may be authorized by a special order made by the "Electricity Commissioners and confirmed by the Minister in "accordance with the provisions of the principal Acts and the "Company are hereby authorized to make application for and "the Electricity Commissioners to make and the Ministry to "confirm such order accordingly."

The company, finding it necessary to raise further capital, made an application for a special order for an increase of capital to the extent of 1,000,000*l.* The Commissioners responded by asking the company to give an undertaking "that the promoters would not make any issue of share "capital under the powers conferred by the order except by "agreement between the promoters and the Electricity "Commissioners as to the terms of the issue." Objection to giving this undertaking was taken by the company on the ground that the persons who were responsible for the management of the finances of the company were the directors. In support of that contention the company relied upon s. 25 of their Act of 1932, which provided: "Notwithstanding "anything in the Companies Clauses Consolidation Acts, "1845 to 1889, or the Companies Clauses Act, 1863, the Company may in issuing any unissued portion of the authorized "share capital dispose of all or any of the shares or stock "representing such capital at such times to such persons on "such terms and conditions and in such manner as the directors "think advantageous to the company." Further objection was taken that the Commissioners were not entitled to make

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private bargains with power companies, and were not authorized to do so by their Act.

The company moved for an order for prohibition of the Commissioners from making it a condition of their special order that such an undertaking be given, and for an order for mandamus directing the Commissioners to make the special order notwithstanding the refusal of the company to give the undertaking. The company brought these motions on the grounds, (1.) that the powers conferred on the Commissioners by the South Wales Electric Power Act, 1932, s. 19, and by the Electricity (Supply) Act, 1919, to authorize by special order the issue by the company of additional share capital did not entitle the Commissioners to make it a condition to the making of a special order that the company should give the undertaking demanded; (2.) that the financial control over the terms of issue by the company of the additional share capital authorized by the special order was, subject to the Defence (Finance) Regulations 1939, vested by the company's special Acts in their directors and that the undertaking demanded would have the effect of divesting the directors of the financial control and vesting it in the Commissioners; (3.) that the undertaking, if given, would be as binding on the company as if it were made an obligation by a clause in the special order, and that the Commissioners would have no jurisdiction to insert such a clause in the special order.

Craig Henderson K.C. and *Alfred Tylor* for the motions. If the company were to accede to the demand for the undertaking it would interfere with the directors' financial control, and would be contrary to the provisions of the special Act. The Commissioners have no authority to demand it and the court will by writ of prohibition prevent "the intentional "usurpation or mistaken assumption of a jurisdiction beyond "that given to the tribunal by law": *Rex v. Board of Education*" (1). Similarly, a mandamus will lie to compel the Commissioners to confine their consideration to relevant matters only and to grant or refuse the order accordingly; but it may be that prohibition is a sufficient alternative remedy, *Rex v. Stepney Corporation* (1) per Lord Alverstone C.J. In any case the court has a discretion as to the grant of this remedy.

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(1) [1910] 2 K. B. 165, 179.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondents. Here the Commissioners have to decide on the amount of new capital to be authorized. They take into account (1.) the cost of works, and (2.) the amount of money to be raised by the issue of the authorised increase, which is not necessarily the actual amount of the capital issued. This is part of the duty imposed on them by the South Wales Electric Power Act, 1932, s. 19. Parliament having entrusted to them the duty of authorizing the amount of increase, they must also be satisfied that it is properly related to the expenditure.

Craig Henderson K.C. in reply, referred to provisions as to apportionings and disposing of new shares issued by a statutory company, as laid down by the Companies Clauses Act 1863, s. 17, and s. 21, amended by the Companies Clauses Act, 1869, s. 5.

VISCOUNT CALDECOTE C.J. [after stating the above facts and contentions, and reading ss. 19 and 25 of the South Wales Electric Power Act, 1932, continued :] Sect. 1 of the Electricity (Supply) Act, 1919, which set up the Commissioners, provides as follows : " (1.) For promoting, regulating, and supervising "the supply of electricity there shall be established as soon as "may be after the passing of this Act, a body to be called the "Electricity Commissioners, who shall have such powers and "duties as are conferred on them by or under this Act, and, "subject thereto, shall act under the general directions of the "Board of Trade "—now the Minister of Transport.

The Attorney-General has submitted an argument to this effect : He says that any tribunal which is charged with a statutory duty is entitled and, indeed, bound to be satisfied on matters relevant to the question to be decided ; and in this particular case, in deciding the right amount to be authorized by the special order asked for, the Commissioners were entitled to take into consideration the amount of money which could be raised by the issue of the authorized increase desired. When that proposition is examined, it appears to be an attempt by the Commissioners, not merely to authorize the share capital which they thought that the company have properly applied for, but to add to that authorization a condition that they, the Commissioners, shall be the masters of the finances of the company instead of the directors of the company. In my opinion that attempt is in excess of the powers which the Commissioners have by virtue of the Act establishing them. It certainly would not appear to be within the purposes mentioned in s. 1 of their Act. The well known judgment of Atkin L.J. in *Rex* v. *Electricity Commissioners* (1), is in point, where he said: "The effect of the Act"—that is, the Act of 1919—"is to give the Commissioners power to act "within limits, wide indeed but strictly defined by statute, "and designed to give a large measure of protection to rights "already vested in undertakers and private persons." Further on he said (2): "In the provision that the final decision of the "Commissioners is not to be operative until it has been "approved by the two Houses of Parliament, I find nothing "inconsistent with the view that in arriving at that decision "the Commissioners themselves are to act judicially and "within the limits prescribed by Act of Parliament, and that "the courts have power to keep them within those limits."

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(1) [1902] 1 K. B. 317, 321.

I am far from saying that when the Commissioners come to consider an application for a special order increasing the share capital of the company they will be unable to consider the circumstances in which they find that the application is made, or the circumstances which may exist when the authorized share capital comes to be issued. They may refuse to make a special order on such examination of the facts as they think to be proper. But what they may not do, in my opinion, is to approve the application for an increase of the share capital and then seek to attach to it some condition, or ask for some undertaking which will make them, not judges of the particular

(1) [1924] 1 K. B. 171, 201.

(2) [1924] 1 K. B. 171, 208.

application which they are considering, that is, of the question whether the capital should be increased, but judges of the financial management of the company. They can not take power to decide questions which may not arise for a considerable time after they have made the special order. That seems to be sufficient to show that the undertaking in question is one for which the Commissioners had no right to ask.

The questions which it might have been necessary to consider in connection with the application for an order of mandamus do not arise in this case, because the Electricity Commissioners in the course of correspondence stated that they were quite satisfied with the purposes for which the additional capital is required, and were prepared to make the order at once in its present form if the company were willing to give the undertaking asked for. On the assumption that the court was prepared to make an order prohibiting the Commissioners from making it a condition of their granting a special order that the company would not make any issue of share capital under the powers to be conferred by the order except by agreement between the company and the Commissioners, the Attorney-General has given an undertaking on behalf of the Commissioners that they will proceed with the making of the order without attaching the condition required. In those circumstances, all that it is necessary for the court to do is to make an order for prohibition in the terms asked for, and the Commissioners will then act in accordance with the undertaking given.

I may add that it is in my opinion unlikely that Parliament ever intended to give the Commissioners the control of the financial position of companies of this kind having regard to the constitution of the Commissioners and the purpose for which they were really established, which was the supervision of the technical operations of the supply of electricity. If Parliament ever intended to give the Commissioners the virtual control of the finance of these companies it would have been done in explicit terms which would have left the parties in no doubt as to the powers of the Commissioners.

Humphreys J. I am of the same opinion. I found myself entirely on the language of the South Wales Electric Power Act, 1932. Sect. 19 of that Act authorizes the company to apply to the Commissioners for permission for an increase in the authorized share capital of the company, as they have done here. One of the matters which, ex concessis, it is proper for the Commissioners to consider is the amount of the proposed increase. That matter has been considered by the Commissioners, who have stated in writing that they are prepared to agree to and approve of the proposed increase of the authorized share capital of this company to the extent of an amount not exceeding 1,000,000*l.* nominal capital. They have added to that a stipulation that they will not make any such order unless the company are prepared to give an undertaking the terms of which have been read.

In my opinion, the Commissioners, in demanding that undertaking, were acting without authorization. There are certainly no words in s. 19 which would justify them in demanding any undertaking from the company as the price of their consent ; and when it is found that the particular undertaking which they require to be given is that the promoters—that is, the company—will not make any issue of shares under the powers conferred by the order except by agreement between themselves and the Commissioners as to the terms of it, reference must be made to s. 25 of the same Act, which appears to me to leave to the directors of the company in terms the consideration, and the sole consideration, of such matters. Further, looking at what may be described as the general Act governing this subject—the Electricity (Supply) Act, 1919, which in fact created the Commissioners—I can find nothing in the whole of it which could be suggested as justifying their interference in this matter. It may or it may not be desirable that they should be given power to interfere in such matters, and I express no opinion about that, but it is quite clear that there is nothing in the Act of 1919 which at present gives them any power to require such an undertaking as that in question. I agree that the order of prohibition should be granted.

SINGLETON J. I am of the same opinion, and I add a few words because of the importance of this case generally. It is unnecessary to refer to the application for an order of mandamus, in view of what the Attorney-General has said.

This dispute between the applicants and the Commissioners has lasted for almost a year. On October 14, 1940, after a meeting between the parties, the solicitors for the applicants wrote to the secretary to the Commissioners in these terms: "As arranged at our meeting with the Commissioners on the "2nd instant, we write to put on record that as the chairman "of the Commissioners then stated, the Commissioners are "quite satisfied as to the purposes for which the additional "capital is required and are prepared to make the order at "once in its present form if our clients are willing to give the "undertaking asked for by the Commissioners' letter of July 13, "but that the Commissioners are not prepared to make the "order at all if that undertaking is not given. We shall be glad "if you will kindly confirm that the above correctly represents "the attitude of the Commissioners. If so, for the reasons "of which the Commissioners are fully aware, our clients "propose to take proceedings to test the right of the Commissioners to insist on the undertaking as a condition of "making the order." The reply to that letter dated October 25, 1940, was as follows: " The Electricity Commissioners . . . . "desire me to confirm that the letter correctly represents their "attitude in regard to the application for the above-mentioned "order . . . . " Thus the Electricity Commissioners sought to obtain from the applicants an undertaking in the terms set out in the judgment of the Lord Chief Justice. The Commissioners are a body established by the Electricity Supply Act, 1919, and, as has been said, in particular in the judgment of Atkin L.J. in *Rex* v. *Electricity Commissioners* (1) they are bound to act within the limits of that statute; they cannot go outside the powers given to them. In this particular case it seems that they are seeking to do so. It is true that under the South Wales Electric Power Act, 1932, s. 19, any increase of capital of the applicants has to be sanctioned by special order made by the Commissioners and confirmed in the manner prescribed in the section. Apart from that, however, s. 25 of that Act shows that the company may, "in issuing any "unissued portion of the authorized share capital" (which includes new capital as provided by s. 19 of the Act, "dispose "of all or any of the shares or stock representing such capital "at such times to such persons on such terms and conditions "and in such manner as the directors think advantageous to the "company." By s. 25 the directors are given complete control over the issue of new capital. The terms and conditions are left to them. When the Commissioners seek to obtain an undertaking that the promoters will not make any issue of share capital under the powers conferred by the special order, except by agreement between the promoters and the Commissioners as to the terms of the issue, it is, in my opinion, quite clear that the Commissioners are endeavouring to place themselves in the position given to the directors by s. 25.

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(1) [1924] 1 K. B. 171, 201.

That was not the intention of Parliament. Parliament has provided certain means of limiting the possible earnings of statutory companies, of which this is one. It took steps many years ago to limit the dividends which could be paid. In 1932 it decided that the terms and conditions of issue of new share capital should be left to the directors of this company. If Parliament had then thought it desirable to hand a matter of that kind over to the Electricity Commissioners, Parliament could have done so. The Commissioners seek to take complete power to settle the terms and conditions of new issues of capital. That is something coming within the power of the directors, and of the directors alone. This court is not concerned with the question whether it is desirable that the Commissioners should be given such a power. The only question for us is whether or not the Commissioners, by seeking to impose an undertaking of this kind on the applicants, are doing something which they are not entitled by law to do.

In *Rex* v. *Board of Education* (1), Farwell L.J. said: "If the tribunal has exercised the discretion entrusted "to it bona fide, not influenced by extraneous or irrelevant

(1) [1910] 2 K. B. 165, 179.

"considerations, and not arbitrarily or illegally, the "Courts cannot interfere; they are not a Court of Appeal "from the tribunal, but they have power to prevent "the intentional usurpation or mistaken assumption of a "jurisdiction beyond that given to the tribunal by law, and "also the refusal of their true jurisdiction by the adoption "of extraneous considerations in arriving at their conclusion "or deciding a point other than that brought before them, in "which cases the courts have regarded them as declining "jurisdiction."

It seems to me that the Electricity Commissioners here, in seeking to extract from the applicants an undertaking of the kind in question, were interfering in matters with which they were not concerned in view of their statutory position as created by the Act of 1919. They had no power to ask for any such undertaking. It was for them to consider the application, and to consider it on all relevant matters, but the undertaking for which they asked is not, in my view, a relevant matter.

In these circumstances the applicants are entitled to the order of prohibition which they seek.

Order for prohibition.

Solicitors: *Sydney Morse & Co.; the Treasury Solicitor.*

F. P. F.

1941
June 24.

BANKU POLSKIEGO *v.* K. J. MULDER AND COMPANY.

Bills of exchange—General acceptance—Acceptance in London, payable in Amsterdam—No presentment—Liability of acceptors—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 19, 52, 72, *sub-s.* 3.

Bills of exchange drawn in Poland on the defendants, a firm in London, and expressed to be payable in Amsterdam were accepted generally. The bills were not presented for payment in Amsterdam, but, after their maturity, the acceptors were called on to pay them. The acceptors having failed to pay, in an action on the bills by holders for value against the acceptors :—

Held, that the position was the same as if the term regarding the place of payment had been inserted by the acceptors as part of their acceptances, and that, therefore, by s. 19 of the Bills of Exchange Act, 1882, the acceptances were general because the bills were not expressed to be payable in Amsterdam only and not elsewhere, and therefore by s. 52, presentment for payment was not necessary to render the acceptors liable.

Held, further, that, as the acceptors were not bound in order to discharge their liability to make payment in Amsterdam, the contracts evidenced by the bills were not required by law to be performed in a foreign country, and, therefore s. 72, sub-s. 3, of the Act did not operate to render the case determinable by the Dutch, and not by the English, law relating to presentment.

ACTION tried by Tucker J.

The plaintiffs, the Banku Polskiego, brought this action against the defendants, K. J. Mulder & Co., as the holders for value of five bills of exchange for various amounts in Dutch florins, all drawn in Poland on May 1, 1939, and payable on November 1 of that year, and all accepted by the defendants. All the bills were in the same form, the first being in these terms: "On November 1, 1939, pay to our order against "this bill of exchange the sum of Dutch florins twenty-two "thousand one hundred and forty." The bill was addressed to K. J. Mulder & Co., Plantation House, Mincing Lane, London, payable in Amsterdam at the Twentsche Bank, and it was drawn by Luban-Wronki, accepted on behalf of the defendants, and subsequently indorsed by Luban-Wronki to the Bank Roluq who indorsed it to the Banku Polskiego. The defendants were called on to pay the bills in August, 1940, but they did not pay them.

In their defence the defendants pleaded: "Further by "Dutch and/or English law presentation for payment of the "said bills at the N.V. Twentsche Bank, Amsterdam, followed "by protest in the event of non-payment, is necessary in order "to charge the defendants as acceptors. The said bills have "not nor has any of them been so presented or protested." It was common ground that the bills had not been presented.

H. G. Robertson for the plaintiffs.

Miller K.C. and *Valentine Holmes* for the defendants.

The arguments appear sufficiently from the judgment.

TUCKER J. [stated the facts set out above, and continued :] Mr. Miller, for the defendants, has contended that these bills were accepted in England, and, therefore, the position must be ascertained according to English law, by which, the bills being contracts the performance of which is to take place abroad, reference must be made to the law of the foreign country in question to see what that law is with regard to performance, and that by the law of Holland presentment is necessary to render an acceptor liable on bills like these. Mr. Robertson, on the other hand, submits that Dutch law has nothing to do with the matter, which is governed entirely by English law, a proposition which he bases on the relevant sections of the Bills of Exchange Act, 1882.

He referred me first to s. 19 which deals with general and qualified acceptance. That section provides: "(1.) An "acceptance is either (*a*) general, or (*b*) qualified: (2.) A general "acceptance assents without qualification to the order of the "drawer. A qualified acceptance in express terms varies "the effect of the bill as drawn. In particular an acceptance "is qualified which is . . . . (*c*) local, that is to say, an acceptance "to pay only at a particular specified place. An acceptance "to pay at a particular place is a general acceptance, unless it "expressly states that the bill is to be paid there only and "not elsewhere." The emphasis there is on the word "only," and it follows that, if an acceptor merely accepts a bill payable at a named place, it remains a general acceptance for the

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purpose of the section. It is only if he accepts expressly to pay at a specified place only and not elsewhere that it becomes a qualified acceptance. In the present case the acceptors simply accepted in general terms. In my view, the position is the same as if the term with regard to the bills being payable in Amsterdam had been inserted by the acceptors as part of their acceptances. The position would then have been that the acceptances were general, the acceptors not having specified that the bills should be payable in Amsterdam and not elsewhere.

The next section, which Mr. Robertson submitted has no real bearing on this case, but to which it is necessary to refer to understand the position, is s. 45, which provides that: "Subject to the provisions of this Act a bill must be duly "presented for payment. If it be not so presented the drawer "and indorsers shall be discharged." Sect. 52 provides: "When a bill is accepted generally presentment for payment "is not necessary in order to render the acceptor liable."

If the matter remained there it would, I think, be clear that it would be no defence to the defendants to say that there had been no presentment, and that, therefore, they were not liable. But Mr. Miller referred me to s. 72, which deals with conflict of laws, and provides: "Where a bill "drawn in one country is negotiated, accepted or payable "in another, the rights, duties and liabilities of the parties "thereto are determined as follows." Those words apply to the bills in this case, and by sub-s. 3 of the section: "The "duties of the holder with respect to presentment for "acceptance or payment and the necessity for or sufficiency "of a protest or notice of dishonour, or otherwise, are "determined by the law of the place where the act is done "or the bill is dishonoured." Mr. Miller says that the words "where the act is done" must mean "where the act is to "be done," and that here payment of the bills is to take place in Holland so that the duties of the plaintiffs with respect to presentment are determined by the law of the place where it has to be done, namely, Holland. Mr. Robertson submits that sub-s. 3 has nothing to do with the present case. He agrees that, if a contract has to be performed in Holland, Dutch law will govern the method of its performance, but he maintains that English law does not require that the performance of the contracts evidenced by these bills should take place in Holland.

I have considered the arguments on both sides in this case, and I have come to the conclusion that that of Mr. Robertson is right. The consequences in English law with regard to presentment are different in the case of an acceptor from what they are in the case of the other parties to a bill. In my view, having regard to the provisions in ss. 19 and 52 of the Act of 1882, it is not correct to say that the acceptors are bound to perform their obligations under this contract by making payment in Holland. Although the bills provide for presentment and payment in Holland, and payment in Holland is one of the methods by which the obligation of the acceptors can be performed, if, none the less, presentment in Holland does not take place, the acceptors according to English law still remain liable on the bills. These contracts, the "proper" law of which is admittedly English, are not contracts the performance of which by the acceptors must take place in a foreign country. Therefore, I think that English law alone governs this case, and by English law it is clear that the acceptor does not escape liability as the result of non-presentment.

Accordingly, there must be judgment for the plaintiffs at the rate of exchange which existed on November 1, 1939, that is, for 14,975*l*. 15*s*. 8*d*., with interest at 4 per cent. from the date of the maturity of the bills.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Slaughter & May.*
Solicitor for defendants: *Herbert Smith.*

R. F. S.

Applied. I.R. COMRS. *v.* SILVERTS, | LTD. [1950] 2 All E.R. 271.

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BRITISH AMERICAN TOBACCO COMPANY, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

F. A. CLARK AND SON, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

Revenue—National Defence Contribution—Company—Controlling interest in another company—Direct or indirect interest—Finance Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 54), *Fourth Sch., paras.* 4, 7 (*b*), 11.

Schedule IV. to the Finance Act, 1937, in dealing with the computation of profits for the purpose of national defence contribution, provides (para. 7 (*b*)) that in the case of a trade or business carried on by a body corporate, " the profits shall include " all income received by way of dividend or distribution of profits " from any other body corporate in which the first-mentioned body " corporate has a controlling interest and which is not liable to be " assessed to the National Defence Contribution."

The words " controlling interest " in para. 7 (*b*) include an indirect as well as a direct controlling interest held by the company which it is sought to tax in any other company.

The same construction attaches to " controlling interest " in paras. 4 and 11 of Sch. IV. to the Act which limits the deductions to be made in assessing the profits of a trade or business for national defence contribution in respect of payments to directors who have a controlling interest in the company which carries on the trade or business.

APPEAL from Lawrence J. on two cases stated by Special Commissioners of Income Tax.

BRITISH AMERICAN TOBACCO COMPANY, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

At a meeting of the Special Commissioners held on October 19, 1939, the appellants, the British American Tobacco Co., Ld., appealed against an additional assessment to National Defence Contribution in the sum of 354,864*l.* for the period commencing on April 1, 1937, and ending on September 30, 1937. The appeal depended on the interpretation of para. 7 (*b*) of Sch. IV. to the Finance Act, 1937 (1). The appellants had an

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(1) By Finance Act, 1937, s. 19, "(1.) There shall be charged, on "the profits arising in each charge- "able accounting period falling "within the five years beginning "on April 1, 1937, from any trade "or business to which this section "applies, a tax (to be called the

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interest in other bodies corporate which were not liable to be assessed to national defence contribution, and the sole question for determination was whether that interest was a "controlling "interest" within the meaning of para. 7 (*b*).

The appellants owned shares in companies carrying on business in various countries throughout the world. The bodies corporate concerned were eleven companies, all of which were incorporated and carried on business outside the United Kingdom and were, therefore, not themselves liable to national defence contribution. The assessment against which the appellants appealed included dividends received by the appellants from each of these companies. The appellants held more than 50 per cent. of the votes in four of the companies. As to the remaining companies, more than 50 per cent. of the votes were owned by the appellants and a company (or companies) in which the appellants owned more than 50 per cent. of the votes and/or a company or companies in which more than 50 per cent. of the votes were owned by a company in which the appellant company owned more than 50 per cent. of the votes. In the case of five of these remaining companies 100 per cent. of the votes were so owned. The Special Commissioners held that the appellants had a controlling interest in each of the eleven companies and dismissed the appeal.

"'national defence contribution') "of an amount equal to five per "cent. of those profits in a case "where the trade or business is "carried on by a body corporate "and four per cent. of those "profits in any other case. "(2.) Subject as hereafter provided, "the trades and businesses to "which this section applies are all "trades or businesses of any "description carried on in the "United Kingdom, or carried on, "whether personally or through an "agent, by persons ordinarily "resident in the United King-"dom."

By Sch. IV., para. 7: "Income "received from investments or "other property shall be included "in the profits in the cases and to "the extent provided in this "paragraph, and not otherwise ". . . . (*b*) in the case of any "other trade or business, being a "trade or business carried on by "a body corporate, the profits "shall include all income received "by way of dividend or dis-"tribution of profits from any "other body corporate in which "the first-mentioned body cor-"porate has a controlling interest "and which is not liable to be "assessed to the national defence "contribution."

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1941. April 8. Lawrence J. in a considered judgment held that the contention of the Crown was correct. It was not a proper inference that, because the Finance Act, 1920, mentioned expressly a controlling interest, direct or indirect, the legislature, when it spoke of a "controlling interest" simpliciter in 1937, meant only a direct controlling interest. The word "controlling" was not a term of art, nor was the word "interest" necessarily so, and when "controlling" was used to qualify "interest" the phrase in its ordinary meaning covered both direct and indirect control. The appeal was therefore dismissed, and the appellants appealed.

F. A. CLARK AND SON, LIMITED, v. INLAND REVENUE COMMISSIONERS.

At a meeting of the Special Commissioners held on December 1, 1939, the appellants, F. A. Clark and Son, Ld., appealed against an estimated assessment to the national defence contribution in the sum of 270*l.* for the accounting period commencing on April 1, 1937, and ending December 31, 1937. The appellant company was incorporated on December 2, 1926, to carry on the business of lead merchants and manufacturers. The issued capital consisted of 22,600*l.* divided into 22,500 preference shares and 100 ordinary shares both of 1*l.* each. All shares carried the right of one vote each at general meetings. At all material times F. C. Brown Clark and F. H. Bessemer Clark were the only directors. The appeal raised the question whether the two directors had, in the material accounting period, a controlling interest in the appellant company within the meaning of paras. 4 and 11 of Sch. IV. to the Finance Act, 1937 (1). If the directors were held to have a controlling interest, the excess of a proportion of their remuneration (7500*l.* a year) over a proportion of 1500*l.* and certain interest and annuities paid to them fell to be disallowed.

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(1) By Finance Act, 1937, Sch. IV, para. 4, provides: "The principles of the Income Tax Acts under which deductions are not allowed for interest . . . . or for rent, and under which the annual value of . . . . hereditaments . . . . occupied for the purpose of a trade or business is excluded, and under which a deduction may be allowed in respect of such annual value, shall not be followed: Provided that nothing in this paragraph shall authorise any deduction in respect of . . . . (*b*) any interest, annuity or other annual payment paid to any person

Under a deed of trust made on February 16, 1927, between F. C. Brown Clark, as settlor, and F. C. Brown Clark, F. H. Bessemer Clark and H. D. Bessemer, as trustees, after reciting that the settlor had lately caused to be issued in the names of the trustees 15,000 preference shares of 1*l.* each in the appellant company and that the said shares were issued in the names of the trustees as nominees of the settlor, it was agreed that the trustees should hold the said shares on trust to pay the interest receivable thereon to F. C. Brown Clark during his life and after his death to transfer the said shares or the proceeds thereof to F. H. Bessemer Clark. Clause 4 of the deed was as follows: "The trustees will at the request of the settlor during his life "attend all meetings of shareholders of F. A. Clark and Son, "Ld. which they shall be entitled to attend by virtue of being "the registered proprietors of the said preference shares or "any of them and will vote at every such meeting in such "manner as the settlor shall have previously directed in "writing and further will if so required by the settlor execute "all proxies or other documents which shall be necessary or "proper to enable the settlor to vote at any such meeting "in the place of the trustees." Up to December 23, 1937, the said shares with the exception of one share which had been transferred to H. Douglas Bessemer in 1927 were registered in the names of the trustees of this deed.

"carrying on the trade or business, "or any royalty or rent so paid: "and for the purpose of para. (*b*) "of this proviso, where the trade "or business is carried on by a "company the directors whereof "have a controlling interest there-"in, the directors shall be deemed "to be carrying on the trade or "business."

Para. 11: "In the case of a "trade or business carried on in "any chargeable accounting period "by a company the directors "whereof have a controlling in-"terest therein, the deduction to "be allowed in respect of the "remuneration of the directors "other than whole time service "directors shall not exceed 15 per "cent. of the profits arising from "the trade or business . . . . in "that period."

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On December 2, 1936, F.C.B.C. (Phœnix) No. 1 Company (hereinafter referred to as the "Phœnix Company") was incorporated. It was an unlimited investment company. Its authorized share capital was 50,000*l.* divided into 1400 "A" ordinary, 3600 "B" ordinary and 45,000 preference shares, all of 1*l.* each. Its issued shares were held as follows: F. C. Brown Clark and F. H. Bessemer Clark, jointly, 1064 "A" ordinary shares and 4797 preference shares. (These shares were all held beneficially by F. C. Brown Clark and F. H. Bessemer Clark.) F. H. Bessemer Clark, 2736 "B" ordinary shares and 10,152 preference shares. At all material times the sole directors of the company were F. C. Brown Clark and F. H. Bessemer Clark.

By an agreement made on December 7, 1936, between F. C. Brown Clark, F. H. Bessemer Clark and the Phœnix Company, after reciting the terms of the deed of trust of February 16, 1927, it was agreed that the Phœnix Company should purchase the life and reversionary interests of F. C. Brown Clark and F. H. Bessemer Clark in the 14,999 preference shares in F. A. Clark and Son, Ld., held by the trustees of the deed of trust. Clause 6 of this agreement was as follows: "On or at any time after December 7 the said Frederick Charles "Brown Clark and Frederick Henry Bessemer Clark shall at "the expense of the company execute and do and procure "to be executed and done such transfers assurances and things "as the company may reasonably require in order that the life "and reversionary interests agreed to be hereby sold and the "legal property in the said shares shall vest in the company."

The issued shares of the appellant company at December 31, 1937, were held as follows:—

	Preference Shares.
The Phœnix Company, including 50 shares in the name of F. C. Brown Clark as nominee for the Phœnix Company	14,999
F. H. Bessemer Clark	5,499
F. H. Bessemer Clark R. C. Furber .. H. Douglas Bessemer } Trustees for R. F. Bessemer Clark's marriage settlement .	1,000

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F. H. Bessemer Clark R. C. Furber .. H. Douglas Bessemer	Trustees for settlement on F. H. Bessemer Clark's children	1,000
H. Douglas Bessemer ..	.. ..	1
Leonard Pells ..	.. ..	1
	Preference Shares	22,500

The 100 ordinary shares issued were held by F. H. Bessemer Clark. The 14,999 preference shares referred to in the agreement of December 7, 1936, were transferred by the trustees of the deed of trust to the Phœnix Company by a transfer dated December 10, 1937, which was registered on December 23, 1937, in the books of the appellant company.

The Commissioners decided, in favour of the appellants, that the Phœnix Company, having been duly incorporated under the Companies Act, 1929, was a legal entity separate and distinct from its shareholders; that, as from December 7, 1936, the Phœnix Company alone was beneficially entitled to the voting rights (inter alia) annexed to the 14,999 preference shares of the appellant company; and, accordingly, that the directors, F. C. Brown Clark and F. H. Bessemer Clark, did not at any material time have a controlling interest in the appellant company, and they, therefore, discharged the assessment. At the request of the Crown the Commissioners stated this case for the opinion of the High Court. Lawrence J. decided in favour of the Crown and from his decision the appellants appealed.

Millard Tucker K.C. and *Scrimgeour* for the British American Tobacco Company, Ld. Where the appellant company holds shares in an intermediate company the interest of that intermediate company in a foreign company is not transmitted to the appellants. "Interest" in para. 7 (*b*) of Sch. IV. to the Finance Act, 1937, is not to be extended so as to include any indirect interest. If the legislature had intended that it should do so, it would have said so expressly, as it did in the Finance Act, 1920, s. 53, sub-s. 2 (*b*), where the words

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"controlling interest in a company," whether held "directly or "indirectly" are used. Cases relating to interest in property such as *Skinner* v. *Attorney-General* (1) do not apply to interest in a company. In the Finance Act, 1927, s. 32, Parliament legislated against the wider meaning in that case attributed to the word "interest" in a company. This is an attempt to add to the income-producing interest of a company liable to the contribution the interest held by the intermediate company. The fact that one company holds the shares in another company, or that the directors are the same does not make the two businesses one: *Gramophone and Typewriter, Ld.* v. *Stanley* (2). *Noble* v. *Inland Revenue Commissioners* (3) only decides that if "A" company is to have control of "B" company, complete control is necessary. The definition of "control" in the Oxford Dictionary is consistent with that view. Moreover, the appellants have not complete control even in the intermediate companies, but only an interest amounting in most cases to less than 75 per cent. of the shares in those companies. In *Automatic Self-Cleaning Filter Syndicate Co., Ld.* v. *Cuninghame* (4) it was held that the company in general meeting could not order the directors to carry out a policy, of which they did not approve, by an ordinary resolution where the articles required a three-fourths majority. In many of these intermediate companies a three-quarters majority is required for certain purposes by the articles.

Heyworth Talbot for F. A. Clark and Son, Ld. Here the "controlling interest" is alleged to be in the hands of the two directors who hold the shares in this body corporate. In construing "controlling interest" weight must be given to both words, and the mere fact that anomalies may result from the construction contended for by the appellants should not affect the question. The "interest" must be a proprietary interest, which is the meaning which would be given to the word in a partnership agreement. The true "control" here is in the hands of the Phœnix Company acting through its

(1) [1940] A. C. 350.
(2) [1908] 2 K. B. 89.
(3) (1925) 12 Tax Cas. 911.
(4) [1906] 2 Ch. 34.

authorized officers, and not in the appellants' directors, and it is exercised through the shareholders in general meeting. When the legislature meant "interest" to include indirect interest it expressly provided so: see Finance Act, 1920, s. 53.

Sir Donald Somervell A.-G., J. H. Stamp and *R. P. Hills*, for the Crown (respondents). The Finance Act, 1922, s. 21, dealt with a different subject-matter and is not in point here. In *Macaura* v. *Northern Assurance Co., Ld.* (1) the court had to consider the meaning of an insurable interest, which again was a different matter from the present. In *Skinner* v. *Attorney-General* (2) Lord Russell points out that, "interest," in taxation cases at least, means more than a mere proprietary interest, and is capable of a wide interpretation. The words "directly "or indirectly" in the Finance Act, 1920, s. 53, sub-s. 2, are not strictly necessary, and express no different intention from that of the present section. The interposition of an intermediary company is a common method of exercising control as between companies, but it does not affect this question of liability to defence contribution. A "controlling interest" is not a term of art, but a phrase which describes the result of a business transaction. It does not depend upon a minute examination of the articles of the company. *Noble* v. *Inland Revenue Commissioners* (3) was rightly decided, and in substance it is true that shareholders who carry 51 per cent. of the voting power in a company exercise control. In the appeal of F. A. Clark and Son, Ld., the intermediate company has 100 per cent. of the voting power in the company alleged to be controlled. A contrary construction to that now contended for would defeat the whole object of the statute.

Tucker K.C. in reply. A holding company is not to be confused with a subsidiary company which is defined in the Finance Act, 1939, s. 42, and Sch. IV., Part 1.

Cur. adv. vult.

Scott L.J. [stated the facts, read the material provisions of

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(1) [1925] A. C. 619.
(2) [1940] A. C. 350, 358.
(3) 12 Tax Cas. 911.

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the Finance Act, 1937, and continued :] I agree with the judgment of Lawrence J. in the appeal of the British American Tobacco Company, but, as the legal issue is one of general importance, it is, perhaps, better to state my reasons. The whole appeal turns on the simple but far-reaching question: What does the phrase "controlling interest" mean in its context in para. 7 of Sch. IV. to the Act of 1937? The company contends that "interest" necessarily means a proprietary interest in the foreign corporation owned by the British company and that the phrase "controlling interest" is not satisfied unless the control is achieved by means of a beneficial holding by the British company of the foreign corporation's shares registered in the name of itself or its nominee, or by means of some other proprietary interest such as an option over shares. To such a control Mr. Tucker, for the company, gave the name "direct" and he contends that the statute excludes indirect control through another corporation, however complete may be the British company's effective control over the intermediary. He relied on the omission from the paragraph of any qualifying epithet, attached to the phrase, such as "direct or indirect" and drew our attention to the presence of those words in the Finance Act, 1920, s. 53, sub-s. 2 (*c*), which dealt with corporations profits tax and provided that "any deduction allowed in respect of the "remuneration of any director, manager or other person con- "cerned in the management of a company, who has a controlling "interest in the company, whether directly or indirectly, "and whether solely or jointly with any other persons shall "not exceed an amount calculated at the rate of 1000*l*. per "annum." The object of that provision plainly was to prevent a person who had a de facto control over the company's annual finance debiting the company's profits with an annual payment to himself of a sum which properly should be regarded as a distribution of profits when earned as if it had been an expenditure incurred in earning those profits. The possibility of such persons exercising influence in many different and devious ways, and of trying to conceal the fact that they were so doing seems to me sufficient to account for the elaboration and particularity of language there used. I, therefore, do not regard the use of that language in that context as affording any sufficient argument for denying their natural meaning to the more simple words of para. 7 of Sch. IV. to the Finance Act, 1937. The Oxford Dictionary contains the following definitions which appear to me to convey the natural meanings of the verb "control" and the noun "interest" as used in the present context: "Control. 4. To exercise restraint or "direction upon the free action of; to hold sway over, exercise "power or authority over; to dominate, command. (1809 "Pinkney Trav. France 184 'Castles . . . . built with the "'evident purpose of controuling . . . . the navigation'"). "Interest. 2. The relation of being concerned or affected in "respect of advantage or detriment; especially an advantageous relation of this kind."

The commercial device of exercising control over a company through one or more intermediate corporations, British or foreign, was already notorious and therefore well known to Parliament in 1937, as was the financial economy in investment open to a company "A," which desired control over a foreign operative corporation "B," if it interposed a holding corporation "C" between itself and corporation "B," causing corporation "C" to acquire a share control in corporation "B." Assuming the sufficiency of a 51 per cent. majority in each stage to give "control," company "A" could thus achieve control of corporation "B" at half the investment cost to itself of acquiring the direct share control of "B," for by the indirect method 49 per cent. of the shares of both "C" and "B" would be paid for by others while "A's" investment would be limited to 51 per cent. of the holding company "C." The commercial practice was and is really addressed to results rather than means. Ownership by the controlling company of the controlling shares in the controlled company was irrelevant, and it was appropriate to choose a word for expressing the relationship between controller and controlled which had a wide meaning, not limited to that of a proprietary relationship. Had Parliament intended to limit the provision to direct shareholding by the British controlling company in the controlled corporation, that intention could have been easily expressed by adding the word "proprietary." In the circumstances I have no doubt that the Chancellor of the Exchequer, if I may personify Parliament in him, had no such intention, for he was concerned to bring within his net such part of the profits of controlled corporations carrying on business abroad as was brought to this country by controlling companies. An obvious fiscal gap had been discovered in the escape, actual or potential, of such profits from the tax-gatherer's net. If the appellants' arguments were accepted, the introduction of any intermediate holding company not carrying on business within the United Kingdom would at once reopen avenues of escape for controlling companies.

In dealing with the usual method of so-called "indirect" control, I have only taken for the purpose of illustration the case of one intermediate company, but the principle is the same if there are more links in the chain, as there are in several of the eleven foreign corporations affected by this appeal. The arithmetical economy is multiplied by each link, as the power of levers can be multiplied by repetition, but in law a point may be reached where the legal limit of remoteness arrives through repetition of intermediate stages or other elaboration.

A subsidiary point was raised on behalf of the appellant company that a mere majority of shares (whether held directly or indirectly within the method I have described) is not enough to give the control contemplated by para. 7 (*b*). It was pointed out that for various purposes both of the articles of association of the appellant company and of the constitutions of the eleven foreign corporations a 75 per cent. majority is required, and it was argued that the statutory control is intended to be a complete control, and that, therefore, an appropriate mathematical adjustment must be made in the relations of the appellant company to each of the eleven foreign corporations before it can be ascertained whether in the case of any one of the eleven the appellant company has or has not control. The Attorney-General relied on the decision of Rowlatt J. in *Noble* v. *Inland Revenue Commissioners* (1) that the degree of control afforded by a 51 per cent. holding is control within the statute. Lawrence J. took the same view and so do I. The appeal must be dismissed, with costs.

In the appeal of F. A. Clark and Son, Ld., the primary question was whether the two directors of that company had such an interest in it so as to bring them within paras. 4 and 11 of Sch. IV. to the Finance Act, 1937, where the phrase is used. Para. 4, sub-para. (*b*) forbids any deduction from the profits of a business carried on by a company of "any interest, annuity "or other annual payment paid to any person carrying on the "trade or business, or any royalty or rent so paid," and the paragraph continues: "for the purpose of para. (*b*) of this "proviso, where the trade or business is carried on by a company "the directors whereof have a controlling interest therein, the "directors shall be deemed to be carrying on the trade or "business." Para. 11 is a similar provision, limiting the remuneration of directors of a company in which they have a "controlling interest." The Special Commissioners decided that the two directors had not such a "controlling interest" in the company. There is no dispute about the facts and the issue depends on a pure question of law. It is the same question as in the British American Tobacco Company's case, except that the phrase "controlling interest" is applied to directors who control the company, instead of to one company controlling another. Lawrence J. could find no sufficient legal ground for giving the phrase one meaning in para. 7 and another in paras. 4 and 11, and I agree with him. In each case the decision must depend on the meaning of the phrase. In my opinion, it contemplates, when standing in the context of any one of the three paragraphs, such a relationship as brings about a control in fact, by whatever machinery or means that result is affected. This appeal also must be dismissed.

CLAUSON L.J. I agree.

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(1) 12 Tax Cas. 911.

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GODDARD L.J. I agree.

Appeals dismissed.

Solicitors for British American Tobacco Co., Ld.: *D. M. Oppenheim.*

Solicitors for F. A. Clark and Son, Ld.: *R. Furber and Son.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

F. P. F.

J. WHARTON (SHIPPING), LIMITED *v.* MORTLEMAN.

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May 14.

Insurance (Marine)—Warlike operation—Merchant ship requisitioned by Admiralty—Collision on way to receive orders to undertake warlike operation—Other vessel sunk.

The A., a merchant vessel which had been requisitioned by the Government, while on her way to a port where she was to receive orders to undertake a warlike operation, collided with and sank the B.:—

Held, that the A. was not engaged in a warlike operation when the collision occurred and the owners of the B. could recover against Lloyd's underwriters under a marine insurance policy.

Decision of Viscount Caldecote C.J. [1941] 1 K. B. 340 affirmed.

Appeal from Viscount Caldecote C.J. (1).

Early on September 11, 1939, the motor vessel, *Brendonia*, was at anchor in the Downs when she was struck by the *Alderpool*, steaming without lights, and sunk. The *Alderpool*, a merchant vessel, had been requisitioned by the Government under the charterparty known as T-99 and, at the time of the collision, was in pursuance of the order of the charterers on her way from the Tyne to Southampton where she was to receive orders to undertake a warlike operation, namely, the transport of army vehicles and petrol to Brest. The master of the *Alderpool* had not been informed of this.

The *Brendonia* was insured against the usual marine risks under a policy which incorporated cl. 20 of the Institute Time Clauses, 1938: "warranted free of capture seizure "arrest . . . . or detainment, and the consequences thereof or "of any attempt thereat; also from the consequences of "hostilities or warlike operations." She was also insured under a war risks policy covering "the consequences of hostilities "or warlike operations by or against the King's enemies."

The owners of the *Brendonia* brought this action under the marine policy against the first defendant who had underwritten the policy for a total loss by perils of the sea. The defendant pleaded (inter alia) that at the time of the collision the *Alderpool* was engaged on a warlike operation and the loss was therefore due to a war risk and not a marine risk. Thereupon the plaintiffs amended their writ and points of claim and claimed alternatively against the second defendant who had underwritten the war risks policy.

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(1) [1941] 1 K. B. 340.

Viscount Caldecote C.J. held that at the time of the collision the *Alderpool* was not engaged in a warlike operation and that the plaintiffs were entitled to recover under the marine risks policy.

The defendant Mortleman appealed.

Sir Robert Aske K.C. and *Waldo Porges* for the appellant. Where a warship is employed on a warlike operation, the warlike operation begins when the ship leaves for the point where she is to take up her duties: *Attorney-General* v. *Ard Coasters, Ld.* (1). Applying that principle here, the *Alderpool* was engaged on a warlike operation as soon as she left the Tyne to proceed to the port where she was to receive orders to undertake the warlike operation.

A. T. Miller K.C. and *Patrick Devlin* for the underwriter of the war risks policy.

The *Alderpool* was not engaged on a warlike operation at the time of the collision. She was merely proceeding to the place where that operation was to begin. If the authorities had changed their minds and decided not to give the intended orders, the *Alderpool* would never have started on any warlike operation.

A. J. Hodgson for the plaintiffs.

Sir Robert Aske K.C. replied.

MACKINNON L.J. [after stating the facts:] Prima facie, the loss of the *Brendonia* was obviously a loss by perils of the sea, and it was for the defendant who had underwritten the marine insurance policy to establish his contention that he escaped liability for it by reason of the concluding words of the f. c. and s. clause incorporated in the policy. To do this it was necessary for him to prove that at the time of the collision the *Alderpool* was engaged in a warlike operation. Viscount Caldecote C.J. held that she was not, and I think that he was right. I am almost content to say that I agree with everything which was said by the Lord Chief Justice in his extremely careful judgment. The only arguments which Sir Robert Aske could bring forward to suggest that the decision was wrong were some isolated passages in the speeches of certain members of the House of Lords when they were dealing with a totally different matter, a case concerning warships. These dicta are to the effect that, when a warship is proceeding to the scene of warlike operations, she must be taken to be engaged in those operations although she has not yet actually joined in them. No doubt that is perfectly correct, but it seems to me to have no bearing on the totally different question which arises here with regard to a purely commercial vessel, which was engaged at the material time in a purely commercial and unwarlike operation. I am quite satisfied that, if the authors of the dicta to which I have referred had had this particular problem brought to their attention and had been asked whether they would come to that conclusion in such a case as the present, they would readily, and, perhaps, with some asperity, have said that that would be a totally illegitimate extension of anything which they had intended to say. The only conceivable connection which the *Alderpool* had with a warlike operation when she ran down the *Brendonia* was that the Admiralty then had an uncommunicated intention of using her on a warlike operation at a later stage in her history. It is impossible to say that that fact constitutes that which the *Alderpool* was doing on the night in question the carrying out of a warlike operation. In my opinion, the decision of the Lord Chief Justice and his reasoning were perfectly correct, and that no other result was possible. The appeal fails and must be dismissed, with costs.

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(1) [1921] 2 A. C. 141.

LUXMOORE L.J. I agree that the appeal should be dismissed for the reasons stated by the Lord Chief Justice and by my brother MacKinnon.

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WHARTON (J.) (SHIPPING), LD. v. MORTLEMAN.

STABLE J. I agree.

Appeal dismissed.

Solicitors: *Ince, Roscoe, Wilson & Glover; J. A. & H. E. Farnfield; Thomas Cooper & Co.*

P. J. B.

RACECOURSE BETTING CONTROL BOARD *v.* BRIGHTON CORPORATION.

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May 27, 28, 29;
June 18.

Rates—Valuation—Totalisator—" Profits basis "—Public utility undertaking—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22, *sub-s.* 1 (*b*).

Buildings erected on a racecourse were occupied under an agreement with the racecourse owners by the Racecourse Betting Control Board, who operated a totalisator in them under statutory authority. The money staked by the public on any race through the totalisator was, under the statutes governing the activities of the board, distributed among the persons who had won bets on that race after the deduction of a percentage determined by the board. This percentage was paid into a fund which the board, after payment of their expenses, the formation of a reserve fund, and contributions to charity, must apply to " purposes conducive " to the improvement of breeds of horses or the sport of horse- " racing " :—

Held, that, in arriving at the rateable value of the premises occupied by the board, it was correct to adopt the " profits basis " and not the " contractor's basis," so that the rateable value would be assessed on the gross amount retained by the board out of the money received by the totalisator after deduction of the expenses of the board.

Semble, a totalisator is not a public utility undertaking.

AWARD stated by an arbitrator in form of special case.

The following statement of the facts is taken, with some amplification, from the judgment of Wrottesley J.

By the award the court was asked to say whether the arbitrator was entitled, as a matter of law, to adopt the "profits basis" in arriving at the rateable value of certain hereditaments occupied by the Racecourse Betting Control Board situate on the racecourse owned by the county borough of Brighton. The premises in question were the buildings occupied by the board for the purpose of working the totalisator. Some of them were erected by the board on sites leased by the county borough to the board. One was let by the county borough at a rent representing five per cent. or thereabouts of the cost of its erection. One, which formed part of a grand stand, was erected by the county borough, the board having found 2000*l.*, part of the cost of erection of the whole

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building, and, presumably, the proportion of the cost properly attributable to the part used for working the totalisator.

The board was established by the Racecourse Betting Act, 1928 (18 & 19 Geo. 5, c. 41), which, by s. 2, sub-ss. 1 and 2, provided: "For the purposes of this Act there "shall be established a Racecourse Betting Control Board "(in this Act referred to as the Board) which shall consist "of a chairman and eleven other members. (2.) The Board "shall be a body corporate and shall have perpetual "succession and a common seal, and may acquire and "hold such land on or adjacent to a racecourse as may be "reasonably required for the purpose of operating a totalisator thereon and such land as may be reasonably required "for the offices of the Board, and may sell or lease any land "held by them which is not required for the aforesaid purposes." In addition, s. 1, sub-s. 2 (*a*), made it lawful on any approved racecourse, notwithstanding any rule of law or enactment to the contrary, whether in a building or not, for the Board and any person authorized by them to set up and keep a totalisator. It was also made lawful (*b*) "for the Board and any person "authorised by them to operate, in accordance with the provisions of this Act, and for the purpose of effecting betting "transactions on horse races only, a totalisator on days when "horse races but no other races take place on the racecourse; "(*c*) for any person to effect betting transactions by means "of a totalisator lawfully operated." By s. 18, sub-s. 1, of the Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58), "The power of the Racecourse Betting Control "Board under sub-s. (2) of section one of the Racecourse "Betting Act, 1928, to authorise any person to set up and "keep, or to operate, a totalisator on an approved racecourse "shall be limited to the giving of such authority to the persons "having the management of the racecourse, and where such "authority is so given, such deductions as the Board may, under "para. (3) of section three of the said Act direct to be made "from moneys staked by means of the totalisator shall be paid "into the totalisator fund, but the Board may pay out of that "fund to the persons having the management of the racecourse "the amount of the expenses shown to the satisfaction of the "Board to have been properly incurred by those persons in "connection with the setting up, keeping and operation of "the totalisator." By s. 3 of the Racecourse Betting Act, 1928: "The Racecourse Betting Control Board (1.) may for "the purposes of this Act issue (subject to such conditions "as they may impose) and at any time revoke certificates of "approval in respect of racecourses and ground adjacent "thereto; (2.) shall make it a condition of the grant of a "certificate of approval of any racecourse that the persons "having the management of such racecourse shall provide a "place, whether in a building or not, where bookmakers may "carry on their business and to which the public may resort "for the purpose of betting, and that the charge to a book-"maker and to any assistant accompanying him, for admission "to an enclosure on the racecourse for the purpose of the "bookmaker's business shall, in the case of a bookmaker, not "exceed five times the amount, and in the case of an assistant "not exceed the amount of the highest charge made to members "of the public for admission to the enclosure; (3.) shall "distribute or cause to be distributed the whole of the moneys "staked by means of a totalisator on any race among the "persons winning bets made by means of the totalisator on "that race, after deducting or causing to be deducted such "percentage of those moneys as the Board may from time "to time determine either generally or with respect to any "particular racecourse; (4.) shall establish a fund known as "the totalisator fund, into which shall be paid the percentage "deducted as aforesaid of moneys staked by means of the "totalisator, and any other moneys received by the Board. ". . . . (6.) shall (subject to the payment out of the totalisator "fund of all taxes, rates, charges, and working expenses, and "to the retention of such sums as they think fit to meet con-"tingencies, and to the payment out of the said fund of such "sums as they think fit to charitable purposes) apply the "moneys from time to time comprised in the totalisator fund "in accordance with a scheme prepared by the Board and "approved by the Secretary of State for purposes conducive "to the improvement of breeds of horses or the sport of "horse racing."

The board issued a certificate of approval in respect of the county borough's racecourse on condition of the county borough's entry into an agreement under which the board erected the first totalisator building on a site provided by the county borough. Various agreements followed. Finally, by an agreement dated April 1, 1936, the county borough demised all their buildings to the board until 1956 at a peppercorn rent. It was a term of this agreement that the board should apportion 60 per cent. of the amount coming into their hands to grants to owners of approved racecourses, of whom the county borough was one, and under this term the county borough, as owners of the Brighton racecourse, would receive substantial sums of money by way of grant from the board. By cl. 6, para. (*c*) (ii.), of the agreement, "Any grants which "in pursuance of the foregoing provisions are made payable "to the racecourse owner shall be applied by it subject to "such conditions as the board may decide and in accordance "with any scheme prepared by the board and approved by the "Secretary of State for one or more of the following purposes "as the board may from time to time decide :—(1.) in the "general improvement of the racecourse ; (2.) in the reduction "of liabilities for improvements already effected ; (3.) in the "reduction of admission charges or entrance fees or in the "increase of stake money or for any other purpose specified "in the scheme." The liability of the board to apportion 60 per cent. of this amount to the racecourse owners was to remain in force until December 31, 1941, and to continue thereafter unless the board and the Racecourse Association, Ld., varied the arrangement or determined it by notice.

In 1935 the hereditaments occupied by the board on the racecourse were assessed at a rateable value of 288*l*. In February, 1938, the corporation, as rating authority, made a proposal that from April 1, 1938, the assessment should be 4300*l*. On March 15, 1938, the assessment committee fixed the rateable value at 2850*l*. Cross notices of appeal were given, and by an agreement in writing, dated September 6, 1940, the recorder of Brighton was appointed arbitrator in the matter. Before the arbitrator it was contended for the board that, in arriving at the rateable value of the premises the "contractor's" basis should have been adopted. The corporation contended that the "profits" basis was correct, on the ground, inter alia, that the totalisator was a public utility undertaking. The recorder held that the latter contention was correct, though not on the ground advanced by the corporation. He stated his award in the form of a special case for the opinion of the court whether his decision was correct.

Craig Henderson K.C. and *Erskine Simes* for the board. The profits basis is not applicable. It is only to be applied, as the cases show (i.) where an inquiry into the actual profits cannot be avoided; and (ii.) where two tests can be satisfied, namely, (*a*) that there is a monopoly, absolute or local, inherent in the hereditament; and (*b*) that the landlord is in a position to exercise that monopoly himself. The profits basis originated about one hundred years ago, being first applied to canals and then to railways: see *Reg.* v. *Grand Junction Railway Co.* (1), *Reg.* v. *West Middlesex Waterworks* (2), and *Kingston Union* v. *Metropolitan Water Board* (3). Since the *Kingston Union* case (3) it has been a rule of law that the profits basis must generally be applied to a public utility undertaking; though in exceptional circumstances, as in *Barking Rating Authority* v. *Central Electricity Board* (4), it may be held to be inapplicable, and in all the cases of public utility undertakings the above two tests are satisfied. [*Rex* v. *Inhabitants of Barnes* (5) and *Reg.* v. *Verrall* (6) were referred to.] But a totalisator is not a public utility undertaking, and no case has ever decided that anything like the totalisator is a public utility undertaking. Nor is there any monopoly, for the totalisator might be operated on the racecourse or on land adjacent. The authorities, in rating the board on the profits basis, have

(1) (1844) 4 Q. B. 18.
(2) (1859) 1 El. & El. 716, 721–23.
(3) [1926] A. C. 331, 344.
(4) [1940] 2 K. B. 493.
(5) (1830) 1 B. & Ad. 113.
(6) (1875) 1 Q. B. D. 9.

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treated the board's statutory powers as if they were a rateable hereditament: see per Lord Shaw and Lord Parker in *Metropolitan Water Board* v. *Chertsey Assessment Committee* (1). The value of the land on which the totalisator stands depends on the available competition, but the profits do not come from occupation of the site, but from the exercise of statutory powers, and the application of the profits is controlled by statute. Therefore, the profits basis was not open to the arbitrator.

Comyns Carr K.C. and *Geoffrey Lawrence* for the respondents. The arbitrator adopted the right basis. Even if he was not bound to adopt that basis, he was entitled to do so, for no rule of law limits the mode of arriving at value for rating purposes: per Lord Halsbury in *Mersey Docks and Harbour Board* v. *Birkenhead Union* (2). All the circumstances must be looked at, and here the circumstance which would be looked at by the hypothetical tenant would be the prospective profits, however they were to be applied: *Mersey Docks and Harbour Board Trustees* v. *Jones* (3). The contractor's basis was held to be proper in the *Birkenhead Union* case (2) because of the particular circumstances there existing. Land must be rated with regard to the use to which it is put: *Reg.* v. *Everist* (4); and here the land was put to the use of earning profits by the totalisator. In the present case there were two monopolies, that of the board in working the totalisator and that of the landlords in their ownership of the racecourse, and the arbitrator might well adopt the profits basis with that in view. Even if it were proposed to adopt the contractor's basis, the value must be estimated in relation to the fact of the monopoly with the result that the rateable value will be the same as that based on profits. Moreover, this was a public utility undertaking, namely, an undertaking for the supply of a service to the public carried on under statutory powers, and it has been a rule of law since *Kingston Union* v. *Metropolitan Water Board* (5) that the profits basis must generally be applied to such an undertaking. No doubt in the great majority of cases in which the profits basis has been applied the hereditament ran into several parishes among which the profits had to be divided, but that is not a necessary element before the profits basis can be adopted.

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(1) [1916] 1 A. C. 337, 357, 363.
(2) [1901] A. C. 175, 180.
(3) (1864) 11 H. L. C. 443.
(4) (1847) 10 Q. B. 178.
(5) [1926] A. C. 331.

Craig Henderson K.C. in reply. A totalisator is not a public utility undertaking. A public utility undertaking is, for example, one for the supply of water, gas or electricity, and the ejusdem generis rule should be applied. The arbitrator has rated the profits of the undertaker and not those of the land just as if anyone occupying the land could earn them.

1941. June 18. WROTTESLEY J. read a judgment in which he stated the facts as set out above and continued: The principal question for the court, therefore, is whether, in order to arrive at the rateable value of these hereditaments, the arbitrator was at liberty to do what he did, and to base it on the gross retentions which the board kept back out of the money laid or betted by the persons who made bets through the totalisator, those gross retentions representing, after deduction of the board's expenses in running these totalisators, the profits that they made out of them.

The contention of the board was, and is, that this was not lawful, and that in the circumstances the arbitrator was bound to adopt what is called the contractor's basis, that is to say, to ascertain the structural value of the buildings and the value of the site, and to apply to those figures, in order to ascertain the rateable value, some such percentage as five per cent. for buildings and four per cent. for land. The rating authority of the county borough contends that the arbitrator was bound or, at least, was at liberty to apply the profits basis. If the arbitrator was at liberty to adopt the profits basis, then the arbitrator's award will be upheld.

The circumstances which governed the letting of these hereditaments are such that it is not possible to ascertain in the ordinary way the rent at which the hereditaments might reasonably be expected to let from year to year. From the statutory provisions set out above, it appears that no tenant is to be expected except the board. Comparison and competition are, therefore, alike excluded. Nevertheless, the rent agreed upon, namely, a peppercorn, is not the rateable value. The board admits this.

By way of a beginning, I have to remember that by statute what is to be ascertained is the rent at which the building in question might reasonably be expected to let from year to year, making certain deductions and allowances. This is equally true whether the hereditaments in question are governed by para. (*a*) or para. (*b*) of s. 22, sub-s. 1, of the Rating and Valuation Act, 1925. However violent this assumption may be, namely, that these buildings could be let from year to year, nevertheless it has to be made. On the one hand, there is nothing in the Acts governing the matter compelling the board to provide a totalisator on the Brighton racecourse, nor is there anything compelling them to provide it in a building. Indeed, the Act of 1928, by s. 1, sub-s. 2, seems to contemplate the operation of a totalisator in a place which is not a building. On the other hand, the board is encouraged to provide and operate totalisators on racecourses, inasmuch as it is empowered to devote a percentage of the gross takings to paying all working expenses and any surplus thereafter to purposes conducive to the improvement of breeds of horses or the sport of horse-racing. This, coupled with the personnel of the board, is calculated to induce the board to set up and operate totalisators where possible. The agreements in this case, under which totalisators were set up, and which are in common form with those throughout the country, illustrate this point.

Quite apart from the statutory directions referred to above, it has been laid down time after time that the measure of rateable value of premises is the rent at which they can be let and not the profits which can be, or have been, made in them. This is equally true if in fact the circumstances, as here, are such that no such letting is possible as is contemplated by the statutory definition. The valuer, therefore, has to create the market in his imagination, and, if necessary, a market consisting of only one landlord and only one proposed tenant. Into the making of the necessary bargain, the question of

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profit is bound to intrude itself. The racecourse owner cannot be expected to provide either sites or buildings unless he receives from them some remuneration and he will naturally use his position as owner of the monopoly of the most convenient land to press for as high a rent as possible. The board, for its part, cannot be expected to provide the totalisator unless the rent it pays is such as to leave it a share of profits adequate to the trouble and risks it takes and such as to enable it to forward the objects that it is set up to foster. The board, too, has an absolute monopoly of its powers under the Acts.

The reasoning is not different in principle from that put by Blackburn J. in the famous passage, so often quoted, in *Reg.* v. *London and North Western Ry. Co.* (1): "Now "there is one principle which is quite clear: in letting "a thing from year to year, the rent would be regulated by "two matters, on the one hand by the benefit the tenant "would be likely to derive from the occupation: because he "would not give more than that; on the other hand, by the "nature of the property, such as its local situation, or how many "persons there are who could supply him with an equally "eligible thing, and be willing to let it to him: for while he "would not be willing to give more than he expected to make "by it, he would not even give that if he could get a similar "thing at a lower rent. In the case in which we gave judgment "the other day (2), we instanced the case of chambers in one "of the Inns of Court. They are let at a higher rent than "they would fetch elsewhere because they give facilities to "gentlemen to carry on the profession of barristers. And if "the Attorney-General could only get one set of chambers to "carry on his business, he would give probably an enormous "rent for them; but it so happens that there are a great "many sets of chambers, and the rent the Attorney-General "gives is just the same as that given for a similar set by a "gentleman only called yesterday. So then, the rent is "given because the chambers afford facilities for carrying on

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(1) (1874) L. R. 9 Q. B. 134, 144.

(2) *Mersey Docks and Harbour Board* v. *Liverpool Overseers*, (1873) L. R. 9 Q. B. 84, 97.

"the business; but the rent is not given according to the "profits made, and the man who makes nothing gives just "as much as the man who is making thousands a year." It is, of course, the first part of that passage that I draw particular attention to.

But, says the board, this is not a case where the profits can be earned only on the hereditaments, nor is it true that on the hereditaments they can be earned by any ordinary tenant. That is true, and, if decisive, the arbitrator had no right to apply the profits basis. It is true that there is nothing to prevent the board, by arrangement with the racecourse owner, from operating a totalisator on the racecourse, but not in a building, and it is also true that there is nothing to prevent the board from operating their totalisator on land adjacent to the racecourse, or from not operating it at all. But these are elements which appear to me to have an important bearing in the negotiations leading to the bargain. They do not appear to make the consideration of the profit to be made in the building irrelevant. The question of profit would still come into the discussion, although these arguments would, doubtless, be used with force by the proposed tenant to limit the demands of the landlord. There is nothing in the case to suggest that the arbitrator put these matters out of his consideration.

Another objection raised on behalf of the board is that you should not apply the profits basis except where an inquiry into the profits earned cannot be avoided. If that means that such an inquiry should not be made in the case of premises the yearly value of which can be ascertained by the ordinary method of comparison with other premises, or by the evidence of a letting of the hereditament itself, which has taken place under ordinary commercial conditions, I should agree.

What happens in the market is the best evidence of the value of the commodities dealt with in the market, and where the best evidence is at hand, courts of law refuse to admit any other. But, at any rate, in the case of premises used for making profits, "it is a mistake to suppose that valuation by "rental is a process dissociated from the idea of profit," to use the language of Lord Watson in *Edinburgh Street Tramways* v.

Lord Provost of Edinburgh (1). In the case of premises used only to make a profit, such as the premises in this case, and not capable of being valued by comparison with other similar premises, the proposed tenant and the landlord would alike be thrown back on to a question of the amount of possible profits to flow from the occupation.

Then, on behalf of the board, Mr. Henderson tells me that an examination of the cases in which the profits principle has been applied discloses that two tests have hitherto been satisfied: First, there must be a monopoly, absolute or local, in the hereditament. Even if this be so—I have not checked it—this case appears to me to pass that test. It is only on the racecourse itself, or on land adjoining, that the board could set up the local totalisator. Secondly, says Mr. Henderson, it must be a monopoly which the landlord himself could exercise. As to this second test, I cannot see anything in the reasoning which led to the decisions in relation to railways, gas-works, electrical undertakings, tramways, racecourses and railway refreshment rooms, which suggests that the principle should not be applied unless the landlord could himself exercise the monopoly. On the contrary, as was said by Lord Halsbury in *Cartwright* v. *Sculcoates Union* (2): "The problem is to ascertain, according to the statute, what "a tenant from year to year might reasonably be expected to "give as rent. For the solution of that problem it appears "to me that apart from the decisions, as to which I will say "a word presently, all that could reasonably affect the mind "of the intending tenant ought to be considered." It is true that in *Port of London Authority* v. *Assessment Committee of Orsett* (3), Lord Haldane said: "The true test is not whether "pecuniary profit can be made out of the occupation, but what "is its value to the person concerned measured, I think, simply "by what he would be willing to give in order to obtain it." This is, I suppose, the high water mark of the argument against the consideration of profits. But if you can only measure what the tenant will give by knowing the profits he is likely to make, then you must consider the profits, and, in so doing, you must apply the true test, namely, the value to the tenant or person concerned.

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(1) [1894] A. C. 456, 475.
(2) [1899] 1 Q. B. 667, 673.
(3) [1920] A. C. 273, 288.

It is true, also, that this is not a case such as came under consideration in *Kingston Union* v. *Metropolitan Water Board* (1). In this case it is not necessary to apply the profits basis to avoid the levying of rates in different rating areas which would amount in all to more than the actual total yearly value of the undertaking. But it does appear to me to be a case where the arbitrator was faced with great difficulty in arriving at the true yearly value of the premises, owing to lack of what I have called an ordinary market. Since he had to arrive at the rent which a tenant would give, and since the only possible tenant is the board, he has not, in my judgment, gone wrong in considering the profits which, as I think, both the tenant himself and the landlord would have considered, the tenant before making his offer and the landlord before accepting it, and which would have induced the tenant to offer a rent which would give the landlord some share of those profits by way of rent. At the same time, I am far from deciding that the activities of the board under the Acts are the provision of a public utility. Indeed, I incline to the opposite view. Nor have I to decide, nor have I decided, that in all cases the only way of arriving at the rateable value of a building containing a totalisator is by applying the profits basis. It is, I think, sometimes forgotten that the application of the profits basis is only a means to an end, the end being to discover the yearly value of a hereditament within the meaning of the statute so as to ensure that the occupier shall make his fair contribution to the rates levied in any area.

The special case was, in some respects, in an unusual form, and included matters which are more in the nature of the arbitrator's reflections and reasoning than findings of fact. But it asks quite clearly the question whether he was at liberty to consider the board's profits, and my answer to that question is that he was. The value to be given to the various matters he discusses in the case is for him and not for me.

(1) [1926] A. C. 331.

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There is one matter, however, which, on the face of the special case, appears to call for further investigation. The arbitrator says: "I have not neglected to consider the fact "that the racecourse trustees received in addition a grant "and the indemnity in respect of Tattersalls enclosure, and "that the rating authority might argue that I should add "a further sum in respect of those benefits. I have taken all "these matters into consideration." I do not think that the grant and indemnity there referred to are proper to be used in this connection so as to increase the rateable value of the hereditament which is the subject of the case; nor, indeed, does the rating authority think so. I shall, therefore, refer the case back to the arbitrator to see whether he increased the rateable value by any amount, and if so, by how much, on account of these matters. By any such sum the rateable value ought to be reduced.

Case remitted.

Solicitors for racecourse board: *Sharpe, Pritchard & Co.*

Solicitor for rating authority: *J. G. Drew, Town Clerk, Brighton.*

W. L. L. B.

1941
June 30;
July 7.

BOSWELL *v.* PARTRIDGE JONES AND JOHN PATON, LIMITED.

Workmen's compensation—Death of workman—Outdoor relief granted to workman during lifetime pending settlement of claim to compensation—Demand by local authority to employer for repayment—No repayment at date of order for compensation—Right of employer to deduct from compensation amount due to be repaid—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 8, *sub-s.* 2 (*iii.*), *s.* 41—*County court—Appeal—Registrar—Duty to give party information—Workmen's Compensation Rules*, 1926, *r.* 61, *sub-r.* 3.

A local authority, acting under s. 41 of the Workmen's Compensation Act, 1925, granted out-door relief to a workman who was suffering from an industrial disease, pending the settlement of his claim to compensation. The workman died from the disease. The authority gave notice to the employer demanding repayment to them of the amount granted to the workman as relief, but the employer had not made any repayment at the date when the amount of the compensation payable to the workman's dependant fell to be determined in the county court:—

Held, that the employer, having omitted to make the repayment before the date mentioned, could not be allowed, under s. 8, sub-s. 2 (iii.), of the Act, to deduct from the compensation the amount which he was liable to repay to the authority.

Observations as to the duty of a county court registrar to give information to a party to a proceeding for the purpose of an appeal by that party.

APPEAL from Newport county court.

On May 11, 1939, the medical board under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, certified that the workman, Charles Boswell, was suffering from silicosis, a disease within s. 43 of the Workmen's Compensation Act, 1925, and was thereby disabled from earning full wages at the work as a bricklayer at which he was employed by the respondent company. He was so employed by them within the twelve months preceding the disablement, and the disease was due to the work. On February 8, 1941, the workman died from the disease. The respondents had paid no compensation to him during his lifetime, but, pending the settlement of his claim to compensation, the Monmouthshire county council had made payments to him amounting to 92*l.* 9*s.* 6*d.* by way of out-door relief.

At the time of the workman's death the amount payable to him as compensation had not been decided by a committee, by arbitration, or by agreement, but the respondents admitted that they were liable to pay to his widow the sum of 300*l.* by way of compensation. They issued a præcipe in the county court in which they stated that they paid into court 300*l.* as compensation for which they admitted liability, and they made an estimated apportionment of that sum as follows: 200*l.* to the widow; 66*l.* 10*s.* 11*d.* to the workman's personal representative; and 33*l.* 9*s.* 1*d.* to the public assistance committee of the Monmouthshire county council. The registrar of the county court reported the matter for inquiry and consideration to the county court judge under r. 61 of the Workmen's Compensation Rules. On April 25, 1941, the matter came before the judge and he declared that 200*l.* was the correct sum to be paid into court. At that date the county council had, under s. 41 of the Workmen's Compensation Act, 1925, demanded from the respondents repayment of the 92*l.* 9*s.* 6*d.* paid to the workman as relief, but the respondents had paid nothing to the council. The workman's widow appealed against the order of the county court judge.

Paull K.C. and *Edgedale* for appellant. The respondents have no power to deduct from the compensation payable by them to the appellant the amount which they are liable to pay to the authority in repayment of the relief granted by the authority to the workman. The only enactment under which the respondents could make any deduction is s. 8, sub-s. 2 (iii.), of the Workmen's Compensation Act, 1925 (1), and that

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(1) By Workmen's Compensation Act, 1925, s. 8, sub-s. 1: "The compensation under this "Act where death results from "the injury shall be a lump sum "of an amount calculated in "accordance with the rules here-"inafter contained . . . ."

By sub-s. 2 (iii.): "There shall "be deducted from the sum as "above calculated the amount of "weekly payments (if any) made "to the workman before his death "so, however, as not to reduce the "lump sum below two hundred "pounds . . . ."

By s. 41: "Where an authority "has granted out-door relief to a "person pending the settlement of "his claim to compensation under "this Act or any scheme certified "thereunder, and . . . . (*a*) such provision applies only to "weekly payments . . . . made to the "workman before his death." That must mean weekly payments made as compensation under the Act and nothing else, and no such payments were ever made by the respondents to the workman. Even if the repayment of relief is to stand on the same footing as the "weekly payments," liability to make a payment is not the same as a payment which has been made, and s. 8, sub-s. 2 (iii.), clearly applies to payments made in the past and not to payments to be made in the future. *Harper* v. *Dick, Kerr & Co.* (1) and *Tucker* v. *Oldbury U.D.C.* (2) were referred to.

Duckworth for respondents. The fact that the respondents are liable to repay the 92*l.* 9*s.* 6*d.* relief is sufficient to bring them within s. 8, sub-s. 2 (iii.), for such a repayment is on the same footing for the present purpose as the "weekly payments" mentioned in the sub-section. That the respondents had not actually made the repayment when the amount of compensation came to be determined is irrelevant.

Gumbel for the county council.

1941. July 7. MacKinnon L.J. I have had the advantage of reading the judgment of du Parcq L.J. I agree with the order which he proposes and with the reasons which he gives.

du Parcq L.J. read the following judgment. By the order appealed from the learned county court judge declared the sum of 200*l.* to be the correct and sufficient sum to be paid into court. This decision can only be supported if it is possible to hold that at the date of the order the respondents were entitled to deduct from the sum of 300*l.* a sum of 100*l.* in respect of compensation payable by them to the deceased workman during his lifetime. The respondents must rely

"relief would not have been "granted had the person then "received or been in receipt of "compensation under this Act ". . . . the authority may give "notice of the relief so provided "to the person liable to pay the "compensation, and if such notice "is given the person so liable shall "on demand . . . . repay to the "authority, up to the amount "which he is liable to pay as compensation . . . . the amount of "the relief . . . ."

(1) (1920) 13 B. W. C. C. 250.

(2) [1912] 2 K. B. 317.

on s. 8, sub-s. 2 (iii.), of the Workmen's Compensation Act, 1925. [His Lordship read the provision.]

The position at the date when the order was made may be summarized as follows: (1.) No payments by way of compensation had been made by the respondents to the workman during his life or to his personal representative after his death; (2.) during the lifetime of the deceased workman and "pending the settlement of his claim to compensation" payments amounting to 92*l.* 9*s.* 6*d.* had been made to him by the county council by way of out-door relief, and it seems clear that this relief, or the greater part of it, would not have been granted had he then "received or been in receipt of "compensation"; (3.) the county council had claimed the repayment of the sum of 92*l.* 9*s.* 6*d.* from the respondents under s. 41 of the Act and, subject to any dispute as to quantum, the respondents were compellable to pay that amount to the county council, but they had not in fact paid any part of it.

In these circumstances the respondents desired to obtain a decision that the sum of 200*l.* and no more was due from them to the dependant of the workman. A perusal of r. 61 of the Workmen's Compensation Rules, 1926, and a comparison of the appropriate form in the appendix (form 55), with the præcipe issued by the respondents make it plain that they found the machinery provided by the Act to be ill-adapted to their purpose, and much might be said about the irregularity of the proceedings. In the circumstances of this case, however, it is not necessary to comment on them in detail. It is enough to say that when Parliament has laid down rules and prescribed forms a party to litigation who deliberately departs from them does so at his own risk.

I will asume (although I need not decide) that, as was suggested on behalf of the respondents during the argument, the following propositions are a correct statement of the law: (1.) That for the purposes of s. 8, sub-s. 2 (iii.), an employer who holds the receipt of the local authority for a sum paid under s. 41 must be taken to have paid compensation during the period covered by the grants of out-door relief; (2.) that it follows that he must be taken to have made weekly payments to the workman before the death of the workman, so as to satisfy s. 8, sub-s. 2 (iii.). But, assuming these propositions to be correct, as they probably are, they do not assist the respondents' case. I cannot persuade myself that an employer who has neither paid compensation to the workman nor repaid to the local authority money granted by them as out-door relief can be said to have made weekly payments to the workman before his death. The respondents cannot improve their position by making a payment now, nor would they have improved it, in my opinion, by giving an undertaking in the county court that they would pay the sum due to the council. The question must be considered with reference to the facts as they were at the date of the order when the rights of the parties fell to be determined. If the propositions set out are correct, the cause of the respondents' failure to show that they have made weekly payments is their own omission to carry out their legal obligation to pay the local authority "on demand," and nobody can be blamed for this delay and its consequences but themselves. They seem, in fact, to have mislaid or lost the first letter of demand and to have paid no attention to it. This is, however, not a strictly relevant consideration, although it may affect what are sometimes called the "merits." The legislature has provided no relief for the employer who has omitted to pay compensation or to do anything equivalent to the payment of compensation. Parliament may have refrained from so providing advisedly, thinking, perhaps, that money due to a workman or a local authority should be promptly paid. I do not feel justified in straining the language of the Act in an attempt to give relief to employers who have misunderstood its provisions, especially as I am not convinced that the intention of the legislature would be carried out if I did so.

In my opinion, the appeal should be allowed, the order of the county court set aside, and it should be declared that 300*l.* is the correct sum to be paid into court.

Before parting with this case it may be well to refer to the complaint made on behalf of the appellant that the registrar refused to communicate to her solicitors for the purposes of

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this appeal, information which he had received in accordance with r. 61, sub-r. 3. Without entering into the merits of this case, it is, I think, desirable to restate the principles enunciated by Lord Loreburn in *Board of Education* v. *Rice* (1), that "a fair opportunity" should be given to parties "for correcting "or contradicting any relevant statement prejudicial to their "view." It has been said in this court that these words may be applied to any inquiry of a judicial character: see the judgment of Clauson L.J. and myself in *Rex* v. *City of Westminster Assessment Committee* (2).

Appeal allowed.

Solicitors: *W. H. Thompson; Goldingham, Wellington and Co.; Torr & Co., for Vernon Lawrence, Newport, Monmouthshire.*

(1) [1911] A. C. 179, 182.

(2) [1941] 1 K. B. 53, 68.

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July 1.

REX *v.* COMPTROLLER GENERAL OF PATENTS.

Ex parte BAYER PRODUCTS, LIMITED.

Emergency legislation—Defence Regulations—Power of His Majesty in Council to make—"Necessary or expedient" for war purposes—Jurisdiction of Courts to investigate legality—Trade mark—Owned by British company—Suspension of use—Emergency Powers (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-s.* 1*—Defence (General) Regulations,* 1939, *reg.* 60 E.

By s. 1, sub-s. 1, of the Emergency Powers (Defence) Act, 1939: "Subject to the provisions of this section, His Majesty may by "Order in Council make such regulations (in this Act referred to "as 'Defence Regulations') as appear to him to be necessary or "expedient for securing the public safety, the defence of the realm, "the maintenance of public order and the efficient prosecution of "any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the "community."

Sub-sect. 1 gives to His Majesty in Council complete discretion to make such regulations as appear to him to be necessary or expedient to effect the purposes named in the sub-section. If a regulation is expressed to have been made because it appeared to His Majesty in Council to be necessary or expedient to secure those purposes, or that fact is to be implied, the court has no jurisdiction to investigate the reasons which moved His Majesty to come to the conclusion that it was necessary or expedient to make the regulation or to inquire whether the making of the regulation was in fact necessary or expedient to effect any of the specified purposes.

Reg. 60 E of the Defence (General) Regulations, 1939, which was added to those regulations by Order in Council dated July 24, 1940 (St. R. & O. 1940, No. 1328), and, by para. 3, provides that where a licence to exercise rights under an enemy-owned patent is in force by virtue of an order made in favour of a person who is not an enemy under s. 2 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (2 & 3 Geo. 6, c. 107), or the Comptroller of Patents proposes to make an order under that section and it is made to appear to him that it is difficult or impracticable to describe or refer to the article without the use of a trade mark registered in respect thereof, the Comptroller may make an order under s. 3, sub-s. 2, of the Act on the application of the licensee, that the use of the trade mark be suspended, notwithstanding that the trade mark is not and has not been in the proprietorship or registered in the name of an enemy or an enemy subject, *held* to be valid.

Decision of Bennett J. in *E. H. Jones (Machine Tools), Ld.* v. *Farrell and Muirsmith* [1940] 3 All E. R. 608 not approved.

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APPEAL from a decision of the Divisional Court refusing an application for an order for prohibition.

Bayer Products, Ld., an English company, claimed to be the absolute owners in equity of numerous pharmaceutical patents belonging to a German company, I.G. Farbenindustrie A.G. One-half of the share capital in Bayer Products, Ld. was held by nominees of an American company which was in no way subject to German control or influence, and the other half was held by nominees of the said German company. The directors of Bayer Products, Ld., at the material time were four British subjects and one American citizen, those appointed by the American shareholders being in a majority, and the others acting since the war independently of the German shareholders in what they considered to be the best interests of the company. Licences had been granted by the Comptroller of Patents to certain licensees under s. 2 of the Patents, Designs, Copyrights and Trade Marks (Emergency) Act, 1939, in respect of some of the patents. Bayer Products, Ld., were not able successfully to oppose the grant of those licences, since the German company was, at the beginning of the war, the registered proprietor of the patents. The trade marks under which the patented products had been sold were not within the scope of s. 3 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, since they belonged to Bayer Products, Ld., and not to the German company. Bayer Products, Ld., therefore, still retained their exclusive rights to sell their products under their trade marks, and those rights constituted the principal goodwill of the company. The position was, however, altered by the amendment of the Act of 1939 by an Order in Council (St. R. & O. 1940, No. 1328) dated July 24, 1940, art. 10 of which added to the Defence (General) Regulations, 1939, reg. 60 E, which empowered the Comptroller, in cases where licences had been granted under the Act, to suspend the rights in connection with the trade marks registered in respect of the patents, notwithstanding that the trade mark was not and had never been in the proprietorship or registered in the name of an enemy. Applications had been made to the Comptroller by British manufacturers for suspension of rights in respect of the trade marks "Evipan" and "Avertin" under which well known pharmaceutical products had been sold by Bayer Products, Ld. The applications were opposed by the company, which alleged that, if licensees of the patents became entitled to advertise their products as the same as, or equivalent to, or a substitute for, those bearing the trade marks of Bayer Products, Ld., the value of those trade marks and of the goodwill and shares of the company would practically cease to exist.

Bayer Products, Ld., accordingly, applied to the King's Bench Division for an order of prohibition to be directed to the Comptroller to restrain him from exercising any jurisdiction or making any orders under the Order in Council, St. R. & O. 1940, No. 1328. The ground on which prohibition was asked was that reg. 60 E was ultra vires because (*a*) it was not necessary nor expedient for any purpose laid down by the Emergency Powers (Defence) Act, 1939; (*b*) it was in effect new legislation; (*c*) the effect of orders made under it would be to confiscate the trade mark rights of British or neutral proprietors, without any provision for compensation; (*d*) the Comptroller was empowered under it to make orders for suspension of trade mark rights which might extend beyond the period of any emergency.

The Divisional Court (Viscount Caldecote C.J., Humphreys and Singleton JJ.) refused the company's application, holding that reg. 60 E was not invalid as being ultra vires the Emergency Powers (Defence) Act, 1939, and that the duty of deciding what was necessary or expedient rested with His Majesty in Council, and not with the court. From this decision the applicants appealed.

Spens K.C. and *Beecroft* for the applicants. The power of His Majesty in Council to make regulations is a delegated power which must be exercised strictly in accordance with the powers given by s. 1, sub-s. 1, of the Emergency Powers (Defence) Act, 1939. Under that sub-section only such regulations can be made as are necessary or expedient for the

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purposes mentioned in the sub-section. Reg. 60 E goes beyond the powers given by the sub-section, for it is neither necessary nor expedient for the purposes mentioned therein. It purports to amend the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, by giving power to the Comptroller of Patents to make orders in respect of registered trade marks owned by British subjects which may have nothing whatever to do with any of the purposes defined in the subsection. Regulation 60 E purports to empower the Comptroller to make orders for purposes for which a regulation could not be made under the Act, and it is, therefore, ultra vires and invalid, by reason of the terms of s. 1, sub-s. 3, of the Act. [They referred to *Bismag, Ld.* v. *Amblins* (*Chemists*), *Ld.* (1) and *Chester* v. *Bateson* (2).]

Sir William Jowitt S.-G. and *Valentine Holmes* (*Lloyd Jacob* with them) for the Comptroller. This case can be answered on two grounds, general and particular. Dealing first with the particular, reg. 60 E only applies where a licence has been or will be granted to someone to use an enemy patent. It may appear to the Comptroller that difficulties will arise in the exploitation of that patent without the use of a trade mark and he may then grant a very limited use of the trade mark. For example, if the drug in question is the anæsthetic "Evipan," the licensee may not brand his goods "Evipan," but he may say "This is a British equivalent for Evipan," or something of that sort. It may be expedient for the efficient prosecution of the war that, where a licence has been granted to a British subject to exploit a German patent, the fullest commercial exploitation of it should be made possible. On general grounds, the question for the court is not "Was this "regulation necessary or expedient?" but "Did this regulation "appear to His Majesty in Council to be necessary or "expedient?" In *E. H. Jones* (*Machine Tools*), *Ld.* v. *Farrell and Muirsmith* (3) Bennett J. treated a case of the taking possession or control of property as if it was only authorized under s. 1, sub-s. 2, whereas that sub-section is expressed to

(1) [1940] Ch. 667.
(2) [1920] 1 K. B. 829.
(3) [1940] 3 All E. R. 608.

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be without prejudice to the general powers conferred by sub-s. 1. The decision of the Divisional Court was right, and the appeal should be dismissed.

Spens K.C. replied.

SCOTT L.J. stated the facts, read ss. 1, 2 and 3 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, and reg. 60 E of the Defence (General) Regulations, 1939, and continued: The question raised in the court below and before us was whether or not the Emergency Powers (Defence) Act, 1939, conferred on the regulation-making authority power to make reg. 60 E. The learned Lord Chief Justice, delivering the judgment of the Divisional Court, held that it was within the powers conferred by the Act to make that regulation. I agree with the decision to which the court came and with the reasons given for it, but I will deal shortly with the point in my own words.

The Emergency Powers (Defence) Act, 1939, is entitled "An Act to confer on His Majesty certain powers which it is "expedient that His Majesty should be enabled to exercise "in the present emergency, and to make further provision "for purposes connected with the defence of the realm." Sect. 1, sub-s. 1, provides: "Subject to the provisions of this "section, His Majesty may by Order in Council make such "regulations (in this Act referred to as 'Defence Regulations') "as appear to him to be necessary or expedient for securing "the public safety, the defence of the realm, the maintenance "of public order and the efficient prosecution of any war in "which His Majesty may be engaged, and for maintaining "supplies and services essential to the life of the community." By sub-s. 2: "Without prejudice to the generality of the "powers conferred by the preceding sub-section, Defence "Regulations may, so far as appears to His Majesty in Council "to be necessary or expedient for any of the purposes men"tioned in that sub-section" inter alia "provide for amending "any enactment, for suspending the operation of any enact"ment, and for applying any enactment with or without "modification," and, by sub-s. 3: "Defence Regulations may "provide for empowering such authorities, persons or classes "of persons as may be specified in the regulations to make "orders, rules and byelaws for any of the purposes for which "such regulations are authorised by this Act to be made, "and may contain such incidental and supplementary pro-"visions as appear to His Majesty in Council to be necessary "or expedient for the purposes of the Regulations." Sub-s. 4 provides that a Defence Regulation shall have effect "not-"withstanding anything inconsistent therewith contained in "any enactment other than this Act."

It was contended by the applicants that under those provisions His Majesty in Council was not empowered to make reg. 60 E. The substance of the argument put before us by Mr. Spens was that the regulation, in so far as it authorized an extension of s. 3 of the Patents Act, 1939, so as to make its provisions applicable to registered trade marks of British subjects, was wholly outside the war purposes to which the power conferred by s. 1, sub-s. 1, of the Emergency Powers (Defence) Act, 1939, was confined; and that, if that was so, the fact that the King in Council was allowed by the section to make such regulations as appeared to him to be necessary or expedient for securing those war purposes was not sufficient to validate the regulation. In the course of the argument I asked Mr. Spens whether his contention was that the purposes named in s. 1, sub-s. 1, of the Emergency Powers (Defence) Act, 1939, were limiting words and that the provision that the King in Council might make such regulations "as "appear to him to be necessary or expedient for securing" those purposes did not authorize departure from the limitation so expressed. In my view, that construction of the sub-section was essential to his argument, but, even if we had accepted it, we might have been entitled to say that the purposes stated in the sub-section were wide enough to include the framing of this regulation and that to construe the sub-section otherwise would be to limit it unduly.

Be that as it may, in my opinion, the effect of the words "as appear to him to be necessary or expedient" is to give to His Majesty in Council a complete discretion to decide what

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regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to control by the courts. In my view, the sub-section clearly conferred on His Majesty in Council that ultimate discretion. It is easy to see why that discretion must be a very wide one. The history of this war has shown all kinds of ways in which, for instance, the maintenance of supplies and services are essential to the life of the community. I cannot imagine a case where that is more obviously true than that of the supply of the many modern medicaments which are necessary for the medical profession and for the maintenance of our medical services.

I now turn to reg. 60 E. Para. 3, which is the critical paragraph, provides: "Where a licence under a patent "is in force by virtue of an order made under s. 2 of "the said Act"—that is a licence to use an enemy patent granted under s. 2 of the Patents, Designs, Copyright and Trade Marks Act, 1939—"and it is made to appear to the "Comptroller that it is difficult or impracticable to describe "or refer to an article or substance manufactured under the "patent without the use of a trade mark registered in respect "of that article or substance or of an unregistered trade mark "used in relation thereto, the Comptroller may make an order "in relation to the trade mark under sub-section 2 of s. 3 of the "Act on the application of the licensee . . . . notwithstanding "that the trade mark is not and has not been in the proprietor-"ship, or registered in the name, of an enemy or an enemy "subject as mentioned in sub-s. 1 of the said s. 3." The Order in Council introducing reg. 60 E of necessity records by implication the fact that His Majesty in Council thought it either necessary, or expedient, or both, to extend the powers of the Comptroller under the Patents (Emergency) Act, 1939, s. 3, in the manner stated in the regulation. For the reasons I have given I am of opinion that the subject-matter of the regulation was within the description of the purposes mentioned in s. 1, sub-s. 1, of the Emergency Powers (Defence) Act, 1939, but, if there be a doubt on that subject, which I personally do not feel, the fact that His Majesty in Council found it necessary or expedient to make the regulation concludes the matter so far as the judicature is concerned.

There has been one decision in the courts which we were asked by the Solicitor-General to consider, namely, the judgment of Bennett J. in *E. H. Jones (Machine Tools), Ld.* v. *Farrell and Muirsmith* (1). In my view, Bennett J. there failed to give effect to the dominant words of s. 1, sub-s. 2, of the Emergency Powers (Defence) Act, 1939, namely, "Without prejudice to the generality of the powers conferred by" sub-s. 1. He treated the question before him as arising solely under sub-s. 2 which contained powers inter alia to authorize the taking possession or control of any property or undertaking, and he held that those words did not authorize what had been done with regard to the "undertaking" which was under "control." Had he considered the case also from the point of view of the general powers conferred by sub-s. 1, I do not think that he could have so held. In my view, sub-s. 2 gave the right to do what was proposed in that case. I do not think that it is necessary to say anything further about that decision. This appeal must be dismissed with costs.

Clauson L.J. On July 24, 1940, His Majesty the King was pleased by and with the advice of his Privy Council to make, by Order in Council, reg. 60 E of the Defence (General) Regulations under the Emergency Powers (Defence) Act, 1939. Sect. 1, sub-s. 1, of that Act provides: "His Majesty "may by Order in Council make such regulations as appear "to him to be necessary or expedient for securing the public "safety, the defence of the realm, the maintenance of public "order and the efficient prosecution of any war in which "His Majesty may be engaged, and for maintaining supplies

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(1) [1940] 3 All E. R. 608.

"and services essential to the life of the community." The Order in Council does not contain an express recital that it appears to His Majesty to be necessary or expedient for the purposes mentioned to make this particular regulation, but, as a matter of construction of the order, I am clear (and I do not think that anyone in the course of these proceedings has thrown any doubt on the proposition) that it shows plainly that it did appear to His Majesty to be necessary or expedient to make this regulation.

The Emergency Powers (Defence) Act, 1939, contains a provision that nothing in the relevant section "shall authorize "the imposition of any form of compulsory naval, military "or air force service or any form of industrial conscription "or the making of provision for the trial by courts martial "of persons not being persons subject to the Naval Discipline "Act, to military law or to the Air Force Act." If it had been contended that reg. 60 E contravened that provision it would have been necessary for this court to consider whether that contention was or was not correct, but that argument has not been put forward.

The applicants have attacked reg. 60 E on the ground that His Majesty was not authorized by the Act of 1939 to make it. It was argued that the regulation was not necessary or expedient for securing the public safety, or any of the other purposes mentioned in the Act, but it appears to me, as a matter of construction of the Act, to be quite clear that the criterion whether or not His Majesty has power to make a particular regulation is not whether that regulation is necessary or expedient for the purposes named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the regulation. As I construe the Act, Parliament has plainly placed it within the power of His Majesty to make any regulation which appears to him to be necessary or expedient for the purposes named.

Accordingly, the validity of reg. 60 E, or any other regulation made under s. 1, sub-s. 1, of the Act, can be investigated only by inquiring whether or not His Majesty considered it necessary or expedient, for the purposes named, to make the regulation and this application for prohibition can succeed only if it is within the power of this court to investigate the action of His Majesty when he stated, as I conceive that His Majesty did in making the Order in Council, that this regulation appeared to him to be necessary or expedient for the named purpose. In my view, this court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The legislature has left the matter to His Majesty and this court has no control over it. I know of no authority which would justify the court in questioning the decision which His Majesty must be taken to have stated that he has come to, namely, that this regulation is necessary or expedient for the specified purposes. If His Majesty once reaches that conclusion with regard to a regulation, that regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that on which His Majesty has acted, the order can be annulled.

This being my view on the construction and effect of the Act, it is clearly wholly irrelevant to discuss whether reg. 60 E was in fact necessary or expedient for securing the public safety, or for any of the other purposes set out in the subsection. It is a wholly irrelevant matter, and we have nothing to do with it. His Majesty formed the view that it was necessary or expedient, for the purposes mentioned, to make the regulation, and, so far as this court is concerned, there is an end of the matter. The effect of the regulation, or what the result will be if the Comptroller acts under it, are matters which are entirely outside the purview of the court, but, while I express that view, I must not be understood to differ in any way from the observations which Scott L.J. has made about the operation of the regulation or the reasons which might well justify it.

It follows that, if the jurisdiction which the applicants seek to prohibit the Comptroller from exercising, is exercised, as it admittedly is, in accordance with the regulation, the case is at an end, and the application properly failed before the Divisional Court and must also fail before this court.

It has been said that there might be a case where, on the face of it, a regulation was bad. If that means that if, on reading the Order in Council making the regulation, it seems in fact that it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I agree that, on the face of the order, it would be inoperative. If that is all that is meant by the expression that an order might be bad on the face of it, I do not differ.

We were referred to a judgment of Bennett J. in *E. H. Jones (Machine Tools), Ld.* v. *Farrell and Muirsmith* (1). His Lordship there placed a certain construction on the Emergency Powers (Defence) Act, 1939, s. 1, sub-s. 2. In his judgment, although he does not expressly say so, he implies, and I think with reasonable clarity, that in his opinion it was within the purview of the court to hold a regulation invalid if, in the opinion of the court, the making of it was not necessary or expedient for the purposes named in the sub-section. If his Lordship did intend to decide that, I cannot agree with him and I should venture to express the opinion that that decision was wrong and should not be upheld.

For these reasons, I am of opinion that the judgment of the Divisional Court should be affirmed and this appeal dismissed.

GODDARD L.J. I agree with all which has been said and with the result which has followed.

Appeal dismissed.

Solicitors for the appellants: *McKenna & Co.*

Solicitor for the respondent: *The Solicitor to the Board of Trade.*

(1) [1940] 3 All E. R. 608.

F. P. F.

HUMBERSTONE ESTATES, LIMITED *v.* ALLEN AND ANOTHER.

C. A.
1941
April 29.

Emergency legislation—Judgment—Enforcement—Rent—Arrears—Lease granted before Courts (Emergency Powers) Act, 1939*—Assignment after Act—Assignees in arrears—Rent due by virtue of contract made before Act—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1.

The landlord of premises demised to a tenant under a lease granted before the Courts (Emergency Powers) Act, 1939, but vested in assignees by an assignment executed by the tenant after that date, cannot proceed to execution on a judgment against the assignees for arrears of rent without obtaining the leave of the court as required by s. 1, sub-s. 1, of the Act: for the case does not come within the proviso in s. 1, sub-s. 1 (*b*), which makes the sub-section inapplicable when the judgment is for the recovery of a debt which is due by virtue of a contract made after the commencement of the Act, as an assignment of a lease creates no contractual relationship between the landlord and the assignee.

Appeal from Hawke J.

By a lease dated September 29, 1937, the defendants demised No. 130, Queen's Gate, London, to one J. Taylor for the term of twenty-five and a quarter years at the yearly rent of 425*l.*, payable quarterly. By an assignment dated February 27, 1940, Taylor assigned to the plaintiffs the residue of the term subject to the rent and the covenants on the lessee's part to be performed. The plaintiffs having failed to pay the two quarters' rent due in September and December, 1940, on February 17, 1941, the defendants obtained judgment for 212*l.* 10*s.* and 11*l.* 5*s.* costs. When issuing the writ the defendants applied under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1, for the leave of the court to proceed to execution on the judgment, but on March 19, 1941, they withdrew the application and, without obtaining leave, they proceeded to levy execution on the plaintiffs' goods and chattels at 130, Queen's Gate, and other addresses. On March 27, 1941, the plaintiffs began proceedings for an injunction to restrain the defendants from seizing or selling or levying execution on or continuing in possession of any of the plaintiffs' goods and chattels in pretended pursuance of the judgment of February 17, 1941, without having first obtained leave to proceed to execution thereon in accordance with the Act of 1939. On the same day the plaintiffs obtained ex parte from Atkinson J. an injunction in these terms until after the hearing of a summons asking for an interim injunction returnable on the next day. This summons was issued, and on April 8, 1941, it came for hearing before Hawke J., who made an order discharging the interim injunction granted by Atkinson J. on the ground that the debt had become due by virtue of a contract made after the commencement of the Courts (Emergency Powers) Act, 1939, within the proviso in s. 1, sub-s. 1 (*b*), of that Act, so that, having regard to the proviso in s. 1, sub-s. 1, of the Act, the Act did not apply. The plaintiffs appealed.

W. A. L. Raeburn for the plaintiffs. Hawke J. was wrong in holding that the debt had become due by virtue of a contract. There is no privity of contract between a landlord and an assign of the lessee, but only privity of estate. Sect. 1, sub-s. 1, of the Act of 1939, therefore, applies, and not the proviso in s. 1, sub-s. 1 (*b*).

Armstrong Cowan for the defendants. Hawke J. was right. The first thing that the defendants knew about the plaintiffs' interest in the property was when they found them in possession and the plaintiffs began to pay the rent. A new contract was created by the plaintiffs' payment of the rent and occupation of the premises and thenceforward the rent became due under that contract.

MacKinnon L.J. The defendants are the owners of some premises in Queen's Gate, London, and in September, 1937, they granted a lease of those premises to one Taylor at a rent of 106*l*. 5*s*. a quarter. In February, 1940, Taylor assigned his interest in the premises to the plaintiffs, who failed to pay the rent which became due in September and December, 1940. If it had not been for the war and the Courts

(Emergency Powers) Act, 1939, the defendants would then have been entitled, as landlords, to distrain on the premises. If they had done so after the passing of the Act they might have been in difficulty under s. 1, sub-s. 2, of the Act, which provides that "a person shall not be entitled, except with "the leave of the appropriate court—(*a*) to proceed to "exercise any remedy which is available to him by way of— "(i.) the levying of distress; . . . . Provided that this "sub-section shall not apply to any . . . . debt or obligation "arising by virtue of a contract made after the commence-"ment of this Act." To bring themselves within the proviso the defendants would have had to show that the debt for rent which was owing to them arose by virtue of a contract made between them and the plaintiffs after the commencement of the Act, when Taylor assigned his interest in the lease to the plaintiffs. In my opinion, it is quite impossible for any such contention to be set up. The contract under which the debt for rent arose was made in September, 1937, with Taylor.

The defendants, however, did not seek to distrain, but they brought an action for the rent and obtained judgment against the plaintiffs. The question then arose whether they were affected by s. 1, sub-s. 1, of the Act, which provides that "a person shall not be entitled, except with the leave of the "appropriate court, to proceed to execution on, or otherwise "to the enforcement of, any judgment . . . . for the payment "or recovery of a sum of money," unless, as in s. 1, sub-s. 2, the debt became due by virtue of a contract made after the commencement of the Act. The defendants originally took out a summons before the master for leave to proceed to execution, but they withdrew it in the belief that this debt had become due by virtue of a contract made after the commencement of the Act and in that belief they proceeded to issue execution. In that, in my opinion, they were wrong. Clearly this was a judgment for the recovery of a debt which became due by virtue of a contract made before the Act, namely, on September 29, 1937, when the defendant granted the lease to Taylor, and the defendants cannot bring themselves within the proviso to the sub-section. That being so, I think that the order of Hawke J. was wrong, that this appeal should be allowed, and that the injunction granted by Atkinson J. should be continued until the hearing of the action.

Luxmoore L.J. I agree. Hawke J. discharged the injunction granted by Atkinson J. ex parte because he held that on the assignment by Taylor of the lease to the plaintiffs and the payment of rent by the plaintiffs to the defendants, some new contract of tenancy arose between the plaintiffs and the defendants. There can be no justification for such a view. The original lease was a contract between the defendants and Taylor. The assignment by Taylor of the benefit of that lease created no contractual relationship between the defendants and the plaintiffs. The defendants were entitled to sue the plaintiffs for the rent reserved by the lease by reason of the privity of estate, not privity of contract, between them and the plaintiffs which resulted from the assignment. The only ground on which it is said that the defendants are entitled to issue execution on their judgment is because it is a judgment for the recovery of a debt which became due by virtue of a contract made after the commencement of the Act of 1939. The short answer is that nothing became due by virtue of any contract made after the commencement of the Act. What became due was the rent reserved by the original lease and it was payable by the plaintiffs to the defendants solely by reason of the privity of estate which arose between them when the assignment was made. The defendants, therefore, ought to be restrained from proceeding to execute the judgment or to enforce it in any way except after complying with the provisions of the Courts (Emergency Powers) Act, 1939. In my view Hawke J. was wrong in discharging the order made by Atkinson J.

Oliver J. I agree.

Appeal allowed.

Solicitors: *Harringtons; Wetherfield, Baines & Baines.*

H. C. G.

POPE *v.* BEAUMONT.

1941
July 11, 14.

Revenue—Income tax—Profits or gains—Computation—Trade receipt—" Division [of profits] or return received from co-operative society "—Mutual trading—Discount, rebate or dividend—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.—Finance Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 19), *s.* 31, *sub-s.* 3.

By the Finance Act, 1933, s. 31, sub-s. 3, a co-operative society is exempt from income tax under Case I. of Schedule D, on sums representing " discount, rebate, dividend, or bonus " granted to its members in respect of their transactions with the society and calculated by reference to the magnitude of those transactions and not to the amount of any share or interest in the capital of the society.

A trader, who was a member of a co-operative society received, under the rules of the society, 51*l.* as a " division or return " out of the net profits of the society in respect of his trade transactions with the society for the year :—

Held, that the above sub-section did not exempt the trader from liability to income tax under Case I. of Schedule D on the 51*l.*, which was a receipt of his trade and must be brought into account for tax.

CASE stated by Special Commissioners of Income Tax.

The respondent, who carried on business as a restaurant proprietor at Stockton-on-Tees, was a member of the Stockton-on-Tees Co-operative Society, from whom he bought ninety per cent. of his supplies of meat. During the trading year dealt with in the assessment under consideration he bought from the society meat at a price of 591*l.* Rule 24 of the rules of the society provided that "the net profits of all business "carried on by the society, after providing for expenses "of management, interest on loans, deposit or paid up shares, "and depreciation of property and fixed stock, may be applied " . . . . (*d*) to a division, or return, to or among members "of the society in proportion to the amount of their purchases "during the period to which the division relates." The society paid to its members a dividend calculated by reference to their transactions with all departments of the society, and in the relevant trading year the respondent received dividends amounting to 51*l.* in respect of his purchases of meat for the purposes of his business. In his accounts the

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respondent charged the full amount paid by him to the society for his purchases of meat as no discount was allowed at the time of purchase. The dividend was included in the assessment as a receipt for the purposes of income tax. On being assessed to income tax under Case I. of Schedule D to the Income Tax Act, 1918, the respondent appealed, contending that he was not liable to income tax in respect of the 51*l.* The Special Commissioners held that the 51*l.* was not a rebate or discount in respect of purchases, but a dividend emerging out of the total transactions of all the members of the society in all the latter's departments. They reduced the respondent's assessment accordingly, but at the request of the Crown stated this case for the opinion of the High Court.

Sir William Jowitt S.-G. and *R. P. Hills* for the appellant. The Finance Act, 1933, s. 31, sub-s. 3 (1), has nothing to do with the question involved in this appeal. It merely states how a co-operative society is to be taxed and allows certain

(1) By Finance Act, 1933, s. 31, sub-s. 1: "In the application to "any company or society of any "provision or rule relating to "profits or gains chargeable under "Case I. of Schedule D . . . . "any reference to profits or gains "shall be deemed to include a "reference to a profit or surplus "arising from transactions of the "company or society with its "members which would be included in profits or gains for the "purposes of that provision or "rule if those transactions were "transactions with non-members, "and the profit or surplus aforesaid shall be determined for the "purposes of that provision or "rule on the same principles as "those on which profits or gains "arising from transactions with "non-members would be so determined."

By sub-s. 3: "It is hereby "declared that in computing, for "the purposes of any provision "or rule mentioned in sub-s. 1 of "this section, any profits or gains "of a company or society which "include any income which is "chargeable to tax by virtue of "the foregoing provisions of this "section, there are to be deducted "as expenses any sums which— "(*a*) represent a discount, rebate, "dividend, or bonus granted by "the company or society to "members or other persons in "respect of amounts paid or "payable by or to them on "account of their transactions "with the company or society, "being transactions which are "taken into account in the said "computation; and (*b*) are calculated by reference to the said "amounts or to the magnitude of "the said transactions and not by "reference to the amount of any "share or interest in the capital "of the company or society."

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deductions. From the point of view of the society the money in question is a legitimate trading expense, but that does not affect the liability of the respondent to charge. By reason of r. 24 (*d*) of the rules of the society, he was able to buy his meat more cheaply. He is a trader who is taxed under Case I. of Schedule D in respect of the profits of his trade. One of the expenses of his trade is the cost of the meat used in the restaurant. If he gets back a rebate or allowance based on the amount of his purchases, that amount should come into account either as diminishing the sums paid for the meat or as increasing the profits of the trade. In other words, the respondent is only entitled to deduct the actual cost of the meat as expenses necessarily incurred to earn his profits: *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1). The Commissioners have fallen into confusion between s. 31, sub-s. 3, of the Act of 1933 and the theory of mutual trading. This is not a case of mutual trading, the principles of which were discussed in *New York Life Insurance Co.* v. *Styles* (2), which was applied in *Jones* v. *South West Lancashire Coal Owners' Association, Ld.* (3). A parallel case to the present was *Westcombe* v. *Hadnock Quarries, Ld.* (4), where deductions were confined to the trader's actual expenditure apart from allowances.

F. Grant (for *Alan Bell,* on war service) for the respondent. Admittedly the doctrine of mutual trading has no bearing on this case, but the respondent is not liable to be taxed on the 51*l.* It was correct in the first instance for the respondent to debit his accounts with the full sum paid for the meat, and there is no ground for saying that he must reopen those accounts, as is argued for the Crown. The transaction of buying the meat was complete when the respondent bought and paid for it, and the money which he received afterwards was not a discount or a rebate. It was, according to r. 24 of the society's rules, a division of the profits of the society, which the respondent received as a member. The fact that

(1) [1914] 2 K. B. 891; [1915] A. C. 433.

(2) (1889) 14 A. C. 381.

(3) [1927] 1 K. B. 33; [1927] A. C. 827.

(4) (1931) 16 Tax Cas. 137.

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s. 31, sub-s. 3, of the Act of 1933 treats discount, rebate and dividend in the same way, and allows them all to be deducted in arriving at the society's profits, does not change a dividend into a discount or rebate, nor does the fact that the amount of the meat bought is an element in the calculation of the dividend alter the character of the sum received, which is neither a discount nor a trade receipt, to be brought into account under Case I. It is a dividend paid out of profits which are not liable to tax, and as such cannot itself be taxed: *Neumann* v. *Inland Revenue Commissioners* (1).

MACNAGHTEN J. stated the facts, read s. 31, sub-ss. 1 and 3, of the Finance Act, 1933, and continued: The result of sub-s. 3 is that, although this sum of 51*l.* which was paid or returned by the society to the respondent formed part of the net profits of the business of the society, nevertheless, in the calculation of the society's liability to income tax, that 51*l.*, and also all other sums paid to other persons in accordance with r. 24 (*d*) of the society's rules, were exempted from tax. It was argued on behalf of the respondent that this 51*l.* was not a rebate or discount, but was a "dividend" to him by reason of his membership of the society, and that, since the society was exempt from paying tax on that sum, he also should be exempt. The commissioners held that that contention was correct, and that the 51*l.* ought not to be included as a receipt in the respondent's trading account.

The question for my decision is whether the 51*l.* was a rebate or discount. It seems to me plain that it was. Such a payment is described in r. 24 (*d*) as "a division, or return, "to or among members of the society." The words "division" and "return" are both, as it seems to me, appropriate to describe it. Looked at from the point of view of the society, it was a "division" or dividend. It was part of a sum which the society was dividing. But, looked at from the point of view of the purchaser of the meat, it was a "return" to him of part of the price that he had paid. It is quite true that it was not a return to which he was entitled as of right. Whether or not he got any return depended entirely on the decision of the society to apply part of their profits in making such returns, but when the society had decided out of their profits to make returns to customers, whether members or non-members of the society, each of the payments so made was a rebate or discount on the sum which the customer had previously paid.

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(1) [1933] 1 K. B. 728; [1934] A. C. 215.

In my opinion, the decision of the commissioners was wrong and the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Jaques & Co., for J. E. Freeman & Son, Darlington.*

F. P. F.

1941
July 17, 18, 30.

NORWICH RATING AUTHORITY *v.* NORWICH ASSESSMENT COMMITTEE AND ANOTHER.

Rates—Case stated by quarter sessions—Power of court to hear and remit—Issue between parties not finally decided—Revision of current list—Proposal for fixed percentage increase—No individual valuation—Validity—Duty of assessment committee and quarter sessions to determine on evidence—Evidence admissible before quarter sessions—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 31, *sub-s.* 5; *s.* 37, *sub-s.* 1.

Where a case has been properly stated on appeal from quarter sessions under the Rating and Valuation Act, 1925, s. 31, sub-s. 5, the court has power, by virtue of that section, together with the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 25, sub-s. 2, to hear the appeal and remit the case, even though its decision does not finally decide the questions at issue between the parties.

The fact that a proposal to amend the current valuation list under the Rating and Valuation Act, 1925, s. 37, sub-s. 1, has been compiled by adding a fixed percentage to existing assessments of different hereditaments of the same class does not necessarily render it bad in law. It is the duty of the assessment committee, or, on an appeal, of quarter sessions, to hear the evidence and decide whether in law it justifies the proposed amendment.

Stirk & Sons, Ld. v. *Halifax Assessment Committee* [1922] 1 K. B. 264 distinguished.

Evidence as to the proposal, if otherwise admissible, should be received by the court of quarter sessions on an appeal, even if it differs from that tendered before the assessment committee.

CASE stated by the Recorder of Norwich under the Rating and Valuation Act, 1925, ss. 31 and 32.

At Norwich Quarter Sessions on February 20, 1940, the appellants appealed against a decision by the respondent assessment committee made in July, 1939, rejecting their proposal under the Rating and Valuation Act, 1925, s. 37, for the amendment of the valuation list then in force in respect of fully licensed premises known as "the Warwick Arms" in Warwick Street, Norwich. The respondent, Fountain, was the occupier of the premises, which were let to him as a tied tenant by the brewers who owned the premises.

The facts, according to the case stated, were as follows: On March 29, 1939, a proposal was made by the appellants under the Rating and Valuation Act, 1925, s. 37, to increase the gross value of the Warwick Arms from 105*l*. to 150*l*. and the rateable value from 84*l*. to 122*l*. On May 18, 1939, notice of objection to the proposal was given to the appellants by the respondent, Fountain, on the grounds (1.) that the proposal was bad in law; (2.) that the proposed assessment was excessive, unfair, and incorrect. Similar notices of objection were served on the appellants by the occupiers of 378 other licensed houses in the district, all of whom had had notice of proposed alterations. On June 6, a letter was sent to the objectors by the respondent assessment committee and a copy thereof to the rating authority, saying that the committee would consider only the question of law raised by the notices of objection. At the hearing before the committee on July 11, 1939, no evidence was tendered, but the valuation officer explained the appellants' proposals which were founded on the gross values of the various premises as settled in 1934. He admitted that considerable changes had taken place in the value of those premises between 1934 and 1938. In framing the proposal in each case he had taken 15*s*. as representing the brewers' average profit on each barrel of beer sold on the premises, the barrelage being assumed to be the same as in 1934. From this figure he made the usual deductions, namely, an allowance for increased rates, for licence duty payable on the increased assessment, and for brewers' profit. He thus arrived at a gross rateable value by the amount of trade done. At the conclusion of the argument before the committee no judgment was given, but on July 27 a letter was sent from the committee to all the objectors stating that the proposals had been rejected. The rating authority appealed to quarter sessions.

Before the learned recorder the appellants contended that the proposal was valid and that it was supported by an estimate of the annual value of the premises on the statutory terms in 1938 and was not an arbitrary addition to the existing assessment; that *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1), which dealt with the valuation list, had no relevance to a proposal to amend the list; that, if there was

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(1) [1922] 1 K. B. 264.

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no evidence before the committee in support of the proposal, it was in consequence of their letter of June 6, 1939; and that the appeal should be heard and determined on its merits. The respondents admitted that the proposal, when made, was not bad on the face of it, and that, whatever method was originally adopted in arriving at the new assessment, the appellants were entitled to give evidence in support of the proposal and to have it heard and determined by the committee, but they contended that both the committee and the recorder were bound to reject the proposal, on the ground that it was supported before the committee solely on the basis of the position of the Warwick Arms in 1934 and not on that in 1938 and was based on an arbitrary rule of thumb addition to the existing assessment: *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1).

The recorder informed the parties that he would decide these contentions first, as a preliminary point of law. No evidence was heard by him and his decision was based on the proceedings before the assessment committee. On April 8, 1940, the recorder held that the method of assessment which was proposed by the valuation officer did not carry out the requirements of *Robinson Brothers (Brewers), Ld.* v. *Durham County Assessment Committee* (2). This method certainly varied in its effect on each of the 379 licensed houses concerned according to the number of barrels of beer sold yearly, but with that exception the system was mechanized and was open to the objection that there was no attempt to ascertain the varying suitability of the houses to which the proposals applied, and no consideration of any alteration in the conditions of the respective districts. He did not think that a hypothetical tenant would be likely to pay for premises a rental arrived at in the rule of thumb manner proposed by the valuation officer in 1940 and based on values existing in 1934. At the request of the appellants, the recorder stated this case for the opinion of the High Court whether his decision was right.

On a preliminary point:—

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(1) [1922] 1 K. B. 264.

(2) [1938] A. C. 321.

Comyns Carr K.C. and *Erskine Simes* for the occupier. It is not open to the rating authority to appeal by way of case stated. Their proper remedy is to apply for writ of mandamus, since the recorder did not hear any evidence or deal with the merits but stopped the case in limine. The case was not concluded, and this court has no material on which it can amend the recorder's decision. In *Reg.* v. *Sutton Coldfield* (1) and *Reg.* v. *Marton cum Grafton* (2), following *Reg.* v. *Kesteven Justices* (3), it was laid down that this court will not entertain a case stated by quarter sessions unless it is so stated that, whichever way the decision goes, it will finally dispose of the matter at issue. If the appellants are right, the recorder has not heard and determined the case according to law. If the appellants wished a case to be stated they should have applied to the recorder to hear the whole of the evidence and fix the assessment. Then the matter could have been decided finally, whatever view this court might take on appeal. The sole duty of this court is to quash or affirm the order of quarter sessions; it is not to give advice: Short and Mellor's Practice of the Crown Office, 2nd ed., pp. 430, 431.

Montgomery K.C. and *Gerald Howard* for the assessment committee. The committee are only concerned to see that the proper assessment is arrived at. The course referred to in the cases cited would appear to be a matter of practice and not of jurisdiction.

Turner K.C. and *F. Grant* for the appellants. This case has been properly stated by the recorder and the court can hear the appeal. The decision of the recorder was a "determination" within s. 31, sub-s. 5, of the Rating and Valuation Act, 1925 (4), which extended to rating appeal the right to apply for a case stated. The powers of the court to make orders thereon were defined by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25, sub-s. 2, and they include power to remit the order of quarter sessions which would be unnecessary where this court had come to a final decision on the matter. [*Rex* v. *Southampton Justices* (1) was referred to.]

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(1) (1874) L. R. 9, Q. B. 153.

(2) (1847) 10 Q. B. 971, 974.

(3) (1844) 3 Q. B. 810.

(4) By Rating and Valuation Act, 1925, s. 31, sub-s. 5: "On the "determination of an appeal under "this section [i.e., to quarter "sessions] any party to the appeal "may, if dissatisfied with the "decision of the court as being "erroneous in point of law, make "an application in writing at any "time within twenty-one days "after the date of the decision to "have a case stated for the opinion "of the High Court on the point of "law, and the court shall, unless it "is of opinion that the application is frivolous, state a case "accordingly."

Comyns Carr K.C. replied.

VISCOUNT CALDECOTE C.J. A preliminary objection has been taken to the hearing of this appeal on the ground that the court has no jurisdiction to entertain an appeal by way of case stated unless its decision on the case stated will finally dispose of the questions between the parties one way or the other. I have come to the conclusion on the authorities that this was never more than a question of practice and is not one of the extent of the jurisdiction of the court. We have been referred to several authorities.

In *Reg.* v. *Kesteven Justices* (2) Lord Denman C.J., dealing with the same point as is raised here, said: "It is satisfactory "that we may now take it as universally known that, on cases "sent from the sessions, the Court of Queen's Bench will not "decide merely for the purpose of putting the inferior court "in motion. To receive cases on which sessions only ask us "whether they shall go forward or not is merely creating "additional expense." That seems to have been the ground which was in Lord Denman's mind when he gave his judgment. He did not say: "We have no jurisdiction."

Lord Denman again referred to the point in *Reg.* v. *Marton cum Grafton* (3), where he said: "We have repeatedly declared "that we shall not act on such direction, but that the court "below ought to hear and decide the appeal, subject to the "opinion of this court on the point raised to avoid the wasteful "expense of parish money in protracted litigation and the very "probable defeat of justice from the long delay which unavoidably attends it. We have had occasion to advert to "such matters before and this case affords a fit opportunity

(1) [1906] 1 K. B. 446.
(2) 3 Q. B. 810.
(3) 10 Q. B. 971, 975.

"for declaring that we may find it absolutely necessary for "the discharge of our other duties to decline answering cases "thus improperly stated." The headnote in *Reg.* v. *Sutton Coldfield* (1) is: "On an appeal against a poor rate the sessions "granted an application to enter and respite the appeal, "subject to a case for the opinion of the Court of Queen's "Bench; the reservation at the end of the case being, if the "court should be of opinion that the quarter sessions ought "not to have granted the application, the entry of the appeal "is to be struck out: Held, that the point being raised on an "order which did not finally dispose of the appeal the court "would not entertain the case." It is plain from that statement that the order from which the appeal was there being taken did not dispose of the case, because the order was to respite the appeal. Therefore it is material to observe that when Blackburn J. gave judgment he said (2): "Such "cases have never been heard, except on a certiorari to bring "up an order of sessions which, if unreversed, would finally "decide the appeal." He then quoted the passage to which I have referred from *Reg.* v. *Marton cum Grafton* (3). Lastly we were referred to *Rex* v. *Southampton Justices* (4), where Lord Alverstone C.J., mentioning *Reg.* v. *Sutton Coldfield* (1), said: "It has, I think, never been doubted that the Court of King's "Bench will not entertain special cases where there will not "be a final order, determining the matter, one way or the other, "depending on the view they take of the special case."

Now we are here dealing with a case stated in pursuance of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, which provides that " the court [of quarter sessions] shall, unless it "is of opinion that the application [for a case stated] is "frivolous, state a case accordingly." I do not say that where, to use the expression of one of the judges in the authorities to which we have been referred, this court is being used as a committee of an inferior court to decide questions which arise in the course of the case, this court will hear the case. In such a case the court will arrive at a proper determination on

(1) L. R. 9 Q. B. 153.

(2) Ibid. 155.

(3) 10 Q. B. 971.

(4) [1906] 1 K. B. 446.

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Viscount Caldecote C.J.

those practical grounds to which Lord Denman C.J. adverted. In such circumstances as are to be found in the present case, however, to which alone my observations are directed, and in view of the power conferred on the court by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25, sub-s. 2, I have come to the conclusion, not only that we have power, but that we ought to hear the appeal which is presented to us by this case stated, and that the preliminary point fails.

TUCKER J. I agree. The learned recorder made an order dismissing the appeal of the rating authority. He came to that decision on the basis that the appellants' proposal was bad in law, but he none the less came to a " determination " of the appeal before him within the meaning of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925. In my view, this case has been properly stated under the provisions of that subsection, and, if the recorder had refused to state a case (this not being a frivolous application), an application could have been made to this court to compel him to do so. That being so, it would seem to be clear that this court has power, by reason of the provisions of the Judicature Act, 1925, s. 25, if it thinks fit and proper, to entertain such an appeal as the present and remit the case to quarter sessions, notwithstanding that the order which the court makes does not finally dispose of the matter. It is, no doubt, desirable that, so far as is possible, courts of quarter sessions should state cases in such a way that this court may be able to dispose of the matter finally, but that is merely a matter of practice. The court always has inherent power to refuse to deal with a case which has been stated either in an improper manner or at an improper stage of the proceedings, but it has jurisdiction to deal with the present case stated and I agree that the preliminary objection fails.

Turner K.C. and *F. Grant* for the appellants. The recorder was in error. *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1) was decided before the Rating and Valuation Act, 1925, which introduced new procedure in rating. *Stirk & Sons,*

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(1) [1922] 1 K. B. 264.

Ld. v. *Halifax Assessment Committee* (1) dealt with a supplemental valuation list on which a rate had been made, whereas the present case is concerned with a proposal for the amendment of a valuation list under s. 37, sub-s. 1, of the Act, which may or may not result in an alteration of the list according to the decision of the assessment committee. In dealing with a proposal made under s. 37, sub-s. 1, it is the duty of the assessment committee to hear the evidence and to determine the matter on its merits. Here the committee failed to perform that duty. It is objected that before quarter sessions the appellants took certain points which had not been raised by them before the assessment committee. They would have been within their rights if they had done so: *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (1); but, in fact, they did not before quarter sessions depart from the ground stated in the original proposal which was based on the law laid down in *Robinson Brothers* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (3), and was intended to bring the existing valuation into line with that decision.

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Montgomery K.C. and *Gerald Howard* for the assessment committee. There is no real difference between the procedure under the Rating and Valuation Act, 1925, and the old procedure. The rating authority have proposed new valuations in respect of a particular class of property by means of a percentage increase on each house and this is irregular.

Comyns Carr K.C. and *Erskine Simes* for the occupier. First, the scheme of assessment put before the assessment committee was illegal. The valuer based his figures on the state of the premises in March, 1934, instead of March, 1939. That was a wrong basis, as also was the rule of thumb method adopted in the proposals. Secondly, the rating authority so conducted the case before the committee as to preclude themselves from putting a different case before the recorder. The Rating and Valuation Act, 1925, s. 31, sub-s. 1, restricts the right of appeal to quarter sessions to persons who appeared before the assessment committee. That strengthens the

(1) [1922] 1 K. B. 264.
(2) [1925] A. C. 309, 325.
(3) [1938] A. C. 321.

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decision in *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (1), that points raised on appeal to quarter sessions must have been taken before the committee. Here the appellants raised points before quarter sessions which had not been raised by them before the committee.

Turner K.C. in reply cited *Rex* v. *Horsham and Worthing Assessment Committee* (2) as showing that a multiplicity of proposals did not involve a new valuation list.

Cur. adv. vult.

1941. July 30. The judgment of the court (VISCOUNT CALDECOTE C.J. and TUCKER J.) was read by TUCKER J. who, after dealing with the facts and the proceedings in the courts below, continued: As the decision of the learned recorder is based entirely on what took place before the assessment committee as distinct from any evidence heard by him it is necessary to consider those proceedings, a note of which is annexed to the case. The notice of objection to the proposals stated as one ground of objection that the proposals were bad in law, and it was arranged by the committee with all parties concerned that this one ground of objection only should be dealt with as a preliminary matter at the meeting on July 11, 1939. At that meeting counsel who appeared for the occupiers did not contend that the proposals were bad on their face, but sought to elicit from the valuation officer the method of arriving at the figures set out in the proposals in order to found a submission of illegality. The valuation officer insisted that he was not there to produce figures, but solely to deal with the objection that the proposals were bad in law, and he argued that the onus of establishing this lay on the occupiers. In the discussion which followed the valuation officer disclosed the basis on which the new values set out in the proposals were founded.

Counsel for the occupiers then submitted that the proposals were bad in law, because the proposed values had been arrived at by a percentage addition based on the trade for the years 1931 to 1933 without any individual valuation of each separate hereditament, and that the figures reflected the value as in

(1) [1925] A. C. 309, 325.

(2) [1937] 2 K. B. 408, 419.

1934 instead of on April 1, 1938, which was the material date. It was on the basis of those proceedings that the learned recorder decided that he was bound to dismiss this appeal relating solely to the Warwick Arms, without hearing any evidence. From his judgment as set out in the case it appears that he felt himself compelled to dismiss the appeal in consequence of the decision in *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1). This was a case decided under the procedure in force before the Rating and Valuation Act, 1925, and it was there held that a supplemental valuation list which had been compiled by the rule of thumb process of making a fixed percentage addition to the existing assessments of a number of different hereditaments of the same class was bad in law as there had been no valuation of individual hereditaments, and that, consequently, a rate which had been based on the list was bad.

Assuming, without deciding, that the method adopted in making the supplemental list in *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1) was identical with that whereby the proposals in respect of the licensed premises in Norwich had come into existence in the present case, we are of opinion that *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1) has no application to the present case, which arises under the quite different procedure contained in the Rating and Valuation Act, 1925. By s. 37 of that Act the revision of current valuation lists is effected by means of proposals to amend those lists, and these proposals, unlike supplemental lists which have come into force and on which a rate has been made, are of no effect unless and until they have been considered and adjudicated on by the assessment committee. Until then they are mere notices which may or may not result in amendments in the list. It is the amendments which are made after inquiry by the committee which produce the results affecting the occupiers and the rating authority. It is, accordingly, in our view, erroneous to say that a proposal which is in proper form and has been served within the appointed time on the proper persons can be bad in law for the reasons given in

(1) [1922] 1 K. B. 264.

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Stirk & Sons, Ld. v. *Halifax Assessment Committee* (1) so as to preclude either the assessment committee or a court of quarter sessions from hearing the evidence sought to be adduced in support of it. Whether or not such evidence when heard may disclose that the amended value sought to be inserted in the list is incorrect for any one or more of a variety of different reasons is another question altogether. It is the duty of quarter sessions to hear the evidence and then decide whether it is such as will in law justify the amendment asked for in the proposal. We are satisfied that in the present case the proceedings before the assessment committee disclosed no ground in law for dismissing this appeal without evidence.

Mr. Comyns Carr, on behalf on the respondent, Fountain, has further contended that, in any event, the rating authority are tied down to the points taken before the assessment committee by the valuation officer, and that, as it appears that the calculations of that officer have proceeded on a wrong basis and that he has directed his valuation to the wrong date, the recorder could not allow any evidence to be given in support of the proposed values which proceeded on a different basis; that for that reason also be was right in dismissing the appeal in limine; and that, although the recorder did not deal with this point in his judgment or in the case stated, none the less this court should not remit the case to him for rehearing, seeing that the only evidence which could be tendered before him would be similar to that which was given before the assessment committee by the valuation officer. We are of opinion that there is no substance in this submission. It is true, as has been stated in *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (2), that an appellant at quarter sessions may have so limited his claim to relief before the assessment committee that he is precluded from raising other and quite separate points on appeal. In this connection, however, it is important to observe that in that case it was held that the appellant had not so precluded himself, and it is helpful to see what was said by Lord Cave L.C. and Lord Carson on the nature of the inquiry before an assessment

(1) [1922] 1 K. B. 264.

(2) [1925] A. C. 309.

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committee. Lord Cave said (1): "I will add that in my "opinion it is undesirable that a ratepayer who after an "objection under s. 1 of the Act of 1864 appeals to quarter "sessions should be held closely to the points taken orally "before the assessment committee. The proceedings on an "objection are and were, I think, intended to be informal and "inexpensive; and, if objections were confined at quarter "sessions to the precise points taken before the committee, it "might be necessary for them in future to obtain legal aid and "for the committee to take accurate notes of the proceedings. "Upon the whole, therefore, I am of opinion that this argument "also fails." Lord Carson used these words (2): "That an "objector is not bound to give evidence in support of his "objection, that no oath can be administered, that there are "no rules of evidence, all show that the committee is in no "sense a court, and that the proceeding is an informal one "with a view to arresting the attention of the committee to "save, if possible, the necessity of an appeal. Indeed, I think "the very object of the section would be frustrated if at such "a stage a party was obliged to employ legal advisers as to "the exact points to be raised from fear he might, through any "omission, be deprived of his right of appeal." In the present case there is only one point raised in the proposal, namely, that the existing assessment should be increased so as to give effect to the decision in the *Robinson Brothers* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (3). Subject to any question as to costs, that point may be supported at quarter sessions by evidence of quite a different nature from that adumbrated by the valuation officer before the assessment committee, but it remains the same point. Furthermore, the mere fact that the valuation officer directed his calculations to the wrong date will not preclude the rating authority from adducing evidence at quarter sessions directed to show what was the true value of the hereditament arrived at in accordance with *Robinson Brothers* (*Brewers*), *Ld.* v. *Durham County Assessment Committee* (3) at the material date, namely,

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(1) [1925] A. C. 309, 318, 319.
(2) Ibid. 335.
(3) [1938] A. C. 321.

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March 29, 1939, after taking into consideration all the circumstances, including any countervailing matters tending to reduce or extinguish the increase which might otherwise result from the application of the principles laid down in that case. All such evidence, if relevant and otherwise admissible, should be received by the court of quarter sessions, notwithstanding that it may proceed on a different basis from that outlined to the assessment committee.

For these reasons this appeal is allowed and the case will be remitted to the recorder for hearing.

Appeal allowed.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for Bernard D. Storey, Norwich.*

Solicitors for the respondents: *Vizard, Oldham, Crowder & Cash, for Mills & Reeve, Norwich; Godden, Holme & Ward, for Hill & Perks, Norwich.*

F. P. F.

INLAND REVENUE COMMISSIONERS *v.* GLENCONNER (LORD).

1941
July 15, 16, 17.

Revenue — Income tax — Settlement on children — Income to be treated as settlor's unless settlement irrevocable on certain date — Provisions for revocation not in operation on that date—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21, *sub-s.* 10.

By s. 21, sub-s. 1, of the Finance Act, 1936, where, during the life of the settlor, any income is paid under a settlement for the benefit of his child, that income, for the purposes of income tax, is to be treated as the income of the settlor.

By sub-s. 10 the section is not to apply to a settlement made before April 22, 1936, " which immediately before that date was " irrevocable."

G, by a settlement made before April 22, 1936, covenanted to pay to his former wife during the joint lives of himself and their two infant children 750*l.* a year in respect of each child to be applied by her for their benefit, provided that, if a child should attain the age of twenty-three years, or if, before he attained that age, the wife should die, G. might revoke one-half of the annuity of 750*l.* Immediately before April 22, 1926, both the wife and children were alive, and neither child had attained twenty-three years of age, so that at that time the deed could not in fact be revoked :—

Held, nevertheless, that it was a revocable settlement, and, consequently did not fall within the exception contained in s. 21, sub-s. 10, of the Act.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the commissioners on January 23, 1940, the respondent, Lord Glenconner, appealed against assessments to sur-tax for 1936/1937 and 1937/1938 in the sums of 13,768*l.* and 15,962*l.* respectively. The appeal was against the disallowance of two sums of 375*l.* claimed by the respondent as deductions in computing his total income for each of the said years.

By a deed of covenant dated December 10, 1935, and made between Lord Glenconner, of the one part, and Lady Glenconner, of the other part, after reciting the marriage of Lord and Lady Glenconner on September 25, 1925, and that there had been issue of the marriage two children, namely, Colin Christopher Paget Tennant, born on December 1, 1926, and James Grey Tennant, born on March 6, 1929, and further reciting that the marriage had been dissolved on February 11, 1935, and that Lord and Lady Glenconner had agreed that, in consideration of Lady Glenconner making no application to the court for maintenance, Lord Glenconner would make the provision for Lady Glenconner and her children set out in the deed, Lord Glenconner covenanted during their joint lives to pay to Lady Glenconner an annuity of 1000*l.* a year, and he further covenanted that in respect of each of their sons he would, during the joint lives of himself and such son, pay to Lady Glenconner an annuity of 750*l.* to be applied for the maintenance, education or benefit of the son as she thought proper. There was the proviso to the covenant that, if a son should attain the age of twenty-three years, or if, before he attained that age, Lady Glenconner should die, Lord Glenconner might, on the happening of those events or at any time thereafter, with the consent in writing of one of the several persons named or designated in the proviso, " by any deed or deeds "revocable or irrevocable revoke or determine one half or less "part " of the annuity of 750*l.* On April 22, 1936, Lady Glenconner and the two sons were still living, and neither of the sons had attained the age of twenty-three years, so that immediately before that date the proviso to the deed had not come into operation.

It was contended on behalf of Lord Glenconner that the deed was a settlement which fell within the exception in s. 21, sub-s. 10, of the Finance Act, 1936 (1), in that it was entered into before April 22, 1936, and immediately before that date was irrevocable; and on behalf of the Commissioners of

(1) By the Finance Act, 1936, s. 21, sub-s. 1: " Where, by virtue " or in consequence of any settlement to which this section " applies and during the life of the " settlor, any income is paid to or " for the benefit of a child of the " settlor in any year of assessment, " the income shall, if at the commencement of that year the " child was an infant and un" married, be treated for all the " purposes of the Income Tax " Acts as the income of the settlor " for that year and not as the " income of any other person."

Sub-s. 10: " This section " applies to every settlement, " wheresoever it was made or " entered into, and whether it " was made or entered into before " or after the passing of this Act, " except a settlement made or " entered into before April 22, " 1936, which immediately before " that date was irrevocable."

Inland Revenue that, although in the circumstances the deed could not be revoked immediately before April 22, 1936, it was still a revocable settlement to the extent mentioned in it and not within the exception, and, therefore, that one half of the annuities of 750*l.* payable in respect of the sons must be treated as the income of Lord Glenconner for income tax purposes.

The commissioners allowed the appeal, saying that they were guided in their decision by the opinion of the Lord President in *Inland Revenue Commissioners* v. *Warden* (1), and they reduced the assessments accordingly. The Commissioners of Inland Revenue appealed.

Sir William Jowitt S.-G., *J. H. Stamp* and *R. P. Hills* for the appellants.

Heyworth Talbot for the respondent.

1941. July 17. MACNAGHTEN J. [after stating the facts and reading s. 21, sub-ss. 1 and 10, of the Finance Act, 1936 :] The only question on this appeal is whether the deed of covenant of December 10, 1935, comes within the exception in s. 21, sub-s. 10, of the Finance Act, 1936.

A revocable settlement is a settlement which can be revoked at some future time. An irrevocable settlement is a settlement which can never be revoked. It is plain, therefore, that this covenant by Lord Glenconner was revocable as to one half of the annuity of 750*l.* provided for each of the two sons in either of the events specified in the proviso. The contention of Lord Glenconner is that the true meaning of the exception is that a covenant made before April 22, 1936, "which "immediately before that date was irrevocable" means a covenant which immediately before April 22, 1936, could not then be revoked. It is admitted that if the words of the section had been : "a settlement made or entered into before "April 22, 1936, which immediately before that date was an "irrevocable settlement," the exception would be inapplicable and the appeal must succeed.

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(1) 1939 S. C. 47 ; 22 Tax Cas. 416.

In my view, that is what the words of the sub-section taken in their natural sense do mean. If the legislature had intended that the exception should apply not only to irrevocable settlements but also to such revocable settlements as could not have been revoked immediately before April 22, 1936, it would have been easy to say so. The exception would have read thus: "except a settlement made or entered into before "April 22, 1936, which could not be revoked immediately "before that date."

Some discussion was raised with regard to s. 21, sub-s. 8, of the Act, which provides that: "For the purposes of this "section, a settlement shall not be deemed to be irrevocable" in certain circumstances. I do not think that any assistance is to be gained in the present case from the provisions of that sub-section, which appears to relate to cases where a settlement appears on the face of it to be irrevocable and provides that nevertheless it is to be deemed revocable in the circumstances set out in sub-paras. (*a*), (*b*) and (*c*). The matter is somewhat further complicated by the proviso to the sub-section, but I think the meaning of the proviso is simply that the fact that an irrevocable settlement contains provisions which are described in the Trustee Act, 1925, s. 33, as "protective trusts" does not bring it within the scope of sub-s. 10. In my opinion, the appeal succeeds.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Hasties.*

W. L. L. B.

istinguished. JERRED *v.* T. RODDAM
ENT & SON, LTD. [1948] 2 All
.R. 104.

HASELDINE *v.* C. A. DAW AND SON, LIMITED, AND OTHERS.

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1941
June 11, 12, 13, 16, 17; *July* 7, 8, 9, 31.

Negligence—Lift in block of flats—Defective condition—Periodic inspection by experts—Injury to passenger—Invitee or licensee—Liability of owner of flats—Liability of repairers.

The access to upper floor flats in a block which was let out in a number of tenancies was by a hydraulic lift which remained in the occupation of the landlord of the flats. The landlord made a contract of insurance with an insurance company against third party risks in respect of the use of the lift, and the insurance company made periodical inspections of the lift. The landlord also made a contract with a firm of engineers to adjust, clean and lubricate the machinery of the lift once every month, to repack the glands when needed, and to report to him if any repairs to the lift were necessary. The lift was thirty-five years old and to the landlord's knowledge had never been overhauled. The engineers told the landlord that the rams of the lift were badly worn and scored and ought to be replaced by new rams, but they did not consider, and, therefore, did not tell the owner, that the lift was dangerous to use. They doubted whether they could obtain the necessary bars and tubes for the replacement owing to the war, and so they suggested that they should make an extra visit each month to grease the rams. The landlord agreed that this should be done. On June 18, 1940, an employee of the engineers repacked one of the glands and he negligently failed to replace it properly, thereby causing the gland to fracture when the lift was worked. Next day the plaintiff, who wished to visit one of the tenants of the flats on business, on the invitation of the owner's servant used the lift to reach the tenant's flat, when, owing to the fracture of the gland, the lift fell to the bottom of the well and the plaintiff was injured. In an action against the landlord and the engineers to recover damages for those injuries :—

Held, by the Court of Appeal, that, whether the plaintiff was an invitee or a licensee of the landlord, the only obligation on the landlord was to take care that the lift was reasonably safe, and that he had fulfilled that obligation by employing a competent firm of engineers to make periodical inspections of the lift, to adjust it and to report on it, and that, therefore, the landlord was not liable.

A person who asks for and is given a gratuitous ride in a vehicle, whether in the horizontal or vertical plane, must take the vehicle as he finds it and is only entitled to a warning of a danger of which the owner is aware, and in the present case the owner of the lift was not aware of any danger in operating the lift :—

Held, by Scott L. J., that the plaintiff was an invitee of the owner of the flats and that the expressions of opinion to the contrary

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effect in *Fairman* v. *Perpetual Investment Building Society* [1923] A. C. 74 were obiter dicta.

Held, by Goddard L.J., that the court was bound by the decision in *Fairman* v. *Perpetual Investment Building Society* to hold that the plaintiff was a licensee.

Held, by Scott and Goddard L.JJ., Clauson L.J. dissenting, that the repairer of an article owes a duty to any person by whom the article is lawfully used to see that it has been carefully repaired in a case where there is no reasonable opportunity for the examination of the article after the repair is completed and before it is used, and when the use of the article by persons other than the person with whom the repairer contracted must be contemplated or expected, and that, therefore, the plaintiff was entitled to recover from the engineers.

Principle of *Donoghue* v. *Stevenson* [1932] A. C. 562 applied.

Per Goddard L.J. *Dransfield* v. *British Insulated Cables, Ld.* (1937) 54 Times L. R. 11, was wrongly decided.

Decision of Hilbery J. reversed in part.

APPEAL from Hilbery J.

The defendant, Charles Bennett Daw, hereinafter called "the landlord," was the owner of a block of flats known as Hornton Court, Kensington, and, with other members of his family who owned other properties, he formed a company, C. A. Daw & Son, Ld., of which he was a director and the secretary, to manage the properties. The landlord himself entered into the tenancy agreements for the flats and he remained the occupier of the common staircase and the lift, but he used the company as his agent to make all contracts and arrangements necessary for the running and the maintenance of the lift. Under that authority the company made a contract of insurance with the Law Accident Insurance Society against third-party risks in respect of the use of the lift, and also a contract with A. & P. Steven, Ld., a firm of engineers, under which Messrs. Steven undertook once a month to adjust, clean and lubricate the mechanism of the lift, to provide packing material for the glands and leather for the control valves, and to furnish signed reports after each periodical visit. Pursuant to that contract the engineers periodically inspected the lift, adjusted, cleaned, and lubricated the mechanism, repacking the glands when necessary, and they furnished a signed report after each visit. After a time, at the request of the landlord, they no longer made a written report after each visit, but they informed the landlord either by telephone or by letter if any repairs or alterations to the lift were necessary.

The lift was installed in 1905 or 1906. During the eighteen years that the engineers had been attending to it in accordance with their contract, it had never been taken down and completely overhauled. It was a hydraulic lift, worked by water under pressure and suspended in the usual way by wire ropes, the hydraulic power being used by means of a cylinder and ram. The cylinder at its lower part where the ram passed through it had a gland, the bottom portion of the cylinder being formed as a stuffing box. The retention of the water by the gland and the packing was essential if the lift was not to fall to the bottom of the well.

In November, 1939, the engineers, replying to a complaint by C. A. Daw & Son, Ld., that the lift was slow in descending, wrote a letter in which they said: "The rams of these "hydraulic lifts are badly worn and scored. The diameter "varies from place to place . . . . All these lifts require to "be fitted with new top and bottom rams, but we know that "you are disinclined to face this expenditure under present "conditions. We doubt if we could obtain the necessary bars "and tubes. We have discussed this matter before and the "better plan is to electrify the lifts which also is probably out "of the question at the moment. We suggest that we send "our men in twice a month, the extra visit per month being "merely to grease the rams . . . . We would manage to "work this in for an additional charge of 10*s.* per month." On November 10, 1939, C. A. Daw & Son, Ld., replied in a letter, which was signed by the landlord in his capacity as secretary of the company, in which they agreed to the engineers' suggestion. The lift was, accordingly, left as the subject of that arrangement.

On April 25, 1940, the Law Accident Insurance Society made their periodical inspection of the lift by their engineer, and on April 29 they reported to the landlord that the lift was generally in good working order with certain immaterial exceptions. On June 18, 1940, an employee of the engineers

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repacked the bottom gland of the lift, but he failed to replace the gland properly on the worn ram, thereby causing the gland to fracture when the lift was worked.

On the following day the plaintiff, Ernest Burdett Haseldine, who was the managing clerk to a firm of solicitors, in the course of his professional duties went to Hornton Court to visit one of the tenants. On arriving at the flats the plaintiff was informed by the porter that the flat which he wanted was on the fifth floor. The porter was standing by the lift, the door of which was open, and he motioned to the plaintiff to enter the lift. The plaintiff did so. The porter also entered the lift, closed the gates and set the lift in motion. When the lift had ascended as far as the second floor, it stopped and then fell to the bottom of the well, the cause of its failure being the fracture of the gland. The plaintiff received serious injury.

The plaintiff brought an action against C. A. Daw & Son, Ld., the landlord and the engineers to recover damages for personal injuries which he had suffered through their negligence. The action was tried before Hilbery J., who held that the plaintiff was a licensee, that the duty which the landlord owed him was merely to warn him of any danger which the landlord actually knew of, and that the landlord did not know that he was exposing persons using the lift to any danger, but that the landlord, as owner and occupier of the lift, was bound to use reasonable care to provide a vehicle which was reasonably safe for the conveyance of passengers and that he had failed in that duty. Hilbery J. further held that, where work of repair is done to an article which will be dangerous to its users unless the repair is done with skill and care, and, further, is done in such circumstances that no examination of the article repaired can be anticipated between the completion of the repair and the use of the article, the repairer owes a duty to the user of the article to use that skill and care, and, as the accident in the present case was due to the negligence of the repairers' servant, the plaintiff was entitled to recover from them also. Hilbery J., therefore, entered judgment for the plaintiff against both the defendants, assessing the damages at 750*l*. The landlord and the engineers appealed.

Sellers K.C. and *Montague Berryman* for the engineers.
Samuels K.C. and *Beney* for the landlord.
Wallington K.C. and *H. G. Robertson* for the plaintiff.
The arguments appear sufficiently from the judgment.

Cur. adv. vult.

July 31. The following judgments were read:

SCOTT L.J. This appeal from Hilbery J. raises two questions in the law of negligence. The first is as to the measure of duty of a landlord of a block of flats towards a stranger who uses a lift to visit a tenant. The second is as to the measure of duty towards the same stranger of a company of lift engineers charged with negligence in the execution of a contract with the landlord whereby for a periodic remuneration they undertook, as independent contractors, to adjust, clean and lubricate the lift, and to report to the landlord if any "repairs "or alterations were necessary." The lift fell when the plaintiff was going up in it, and he was injured by the fall. The learned judge awarded him 750*l*. damages against both the landlord, Mr. Daw, who was the third defendant, and the engineers, A. & P. Steven, Ld., who were the second defendants. Both these defendants appeal on the issue of liability, but neither on the amount of damages. [His Lordship stated the facts, described minutely the mechanism of the lift, and continued :] The immediate cause of the accident was that one of the two studs by which the gland was attached to the cylinder and also the cast iron gland itself broke right across. The cause of the gland and stud breaking was the main question of fact in controversy at the trial. It was also in issue on appeal before us, in that the learned judge's findings on it were challenged. He held that the fracture was brought by the co-operation of two factors. His first factor was this. Both rams had in the course of their long working life become worn unevenly, though in differing degrees, in such a way as to cause the diameter to vary from place to place throughout their length and so to be smaller in one part than another. This worn condition was much less serious in the lower ram than in the upper, but a technical opinion was expressed by some of the witnesses that, as the cylinder moved up the lower ram from a part which had been worn thinner to a part which was less worn and, therefore, thicker, the unevenness was sufficient to develop a wedge-like increase of compression in the packing in the stuffing-box which would give rise to stresses in the iron gland which would, or might, have a disruptive effect. For reasons which I will state presently, I am not satisfied that the evidence justified the inference drawn by the learned judge that the strain so imposed on the gland was either in amount or in direction such as did or could have any disruptive effect on the gland, or in any way contribute to the breakdown which did take place. To found the legal views which I have formed on the question of liability, it is not necessary for me to form a definite conclusion on the issue of fact involved in the learned judge's first factor, for, if my views are right, the engineers are liable and the landlord is not liable, whether the worn ram was or was not a contributing factor. None the less, having considered the evidence on the issue with care, I conceive it to be my duty, in case there is an appeal to the House of Lords, and my legal views are overruled, to state my views on the facts relating to that factor.

The learned judge's second factor was very different in kind to his first and, in my opinion, was the direct cause of the rupture of the gland. The engineers' mechanic had, on June 17 and 18, 1940, been adjusting the machinery of the lift, pursuant to the terms of the current contract with the landlord, and on June 18, the day before the breakdown, had repacked the lower stuffing-box. In readjusting the gland he had failed to " adjust " it into its proper position, namely, at right angles to the axis of the cylinder with the two nuts tightened to an equal degree on their respective studs. The result was that he left it askew, with one stud holding it more tightly than the other. The effect of this on the gland itself was, when the water pressure came on, to set in operation stresses acting laterally instead of vertically, and unevenly on the respective sides of the gland instead of evenly—in short it gave rise to stresses to which the design of the casting was not addressed. Hence the breakdown. With the learned judge's finding of fact that this was a cause of the breakdown I wholly agree, though I disagree with his conclusion that the condition of the ram was a contributory cause of the breakdown of the gland. [His Lordship reviewed the evidence in detail and concluded by saying:] The right inference from the evidence appears to me to be that the act of negligence on the part of the mechanic was the sole cause of the plaintiff's hurt. At the lowest the evidence sufficed to throw the burden of proof on the party alleging that the worn condition of the lower ram had any causal materiality; and for reasons I have already given I am satisfied that that burden was not discharged. But even if, as the learned judge thought, the state of the ram did predispose the gland to rupture under the new strain of the tilted gland the latter was the direct cause of the accident, and I hold accordingly.

On the issues of legal liability there was much controversy before us. As regards the landlord, was the plaintiff a mere licensee or was he an invitee? What was the landlord's duty towards him? If he was a mere licensee on the landlord's premises, did the fact that he was being carried in a moving lift impose on the landlord, as the learned judge thought, a higher measure of duty than that of an ordinary occupier towards a licensee? If he was an invitee, did an absolute duty rest on the landlord to provide a reasonably safe lift, or was it only a qualified duty to take reasonable care to provide a safe lift? As regards the engineers, did they owe any duty to the plaintiff, or was their contractual duty to the landlord the only duty that rested on their shoulders? Is the principle enunciated in *Donoghue* v. *Stevenson* (1), and applied in *Grant* v. *Australian Knitting Mills, Ld.* (2), to the case of a manufacturer, one which extends to a repairer, and, if so, what are its limitations?

It will be convenient to discuss the law affecting the landlord first. His position was the ordinary one in a block of flats. He retained possession and control of the staircases, lifts and

(1) [1932] A. C. 562.

(2) [1936] A. C. 85.

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other common parts giving access to the various flats. The terms of the tenancies were not in evidence, but, if they were, they would, in my opinion, on the above facts, be irrelevant. The learned judge held that towards the landlord the plaintiff was a mere licensee, because it was on the business of the tenant that the plaintiff was on the landlord's premises. In so holding he was following what he thought had been actually decided by the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (1). Three noble Lords, constituting the majority, there said in the course of their opinions that an invitee of a tenant of a flat who uses a part of the block of flats of which the landlord retains occupation is a mere licensee of the landlord. If that view was essential to the decision, of course the learned judge was bound to apply the law so laid down, and so are we. If it was not, this court has the right, and also the duty, to form and express its own opinion, while paying the respect that is due to any considered expression of opinion in the House of Lords.

For reasons which I will state in a moment, I think it is still open to this court to take that course, and, if so, it is my duty to express my view. It is that in the ordinary case the landlord of a block of flats, who retains possession, occupation and control of the means of access which he provides for the use of his tenants and their visitors, has an interest of his own in facilitating access to the flats not only of his tenants and their households but also of their visitors, and, therefore, that when a visitor avails himself of the proffered access he does so on the implied invitation of the landlord. If so, the plaintiff was the landlord's "invitee"—to use a non-English word made common, if not invented, by our judges, which however, is less misleading than the phrase "licensee with an "interest" used by some judges as a synonym for "invitee," for the latter seems to predicate an interest in the licensee rather than in the licensor which normally cannot be relevant. I recognize that *Fairman's* case (1) is often cited as deciding that the landlord's relationship to such a visitor is that of licensor to a mere licensee, and it is, therefore, necessary to

(1) [1923] A. C. 74.

look closely into it to see what was really involved in the decision. The actual ratio decidendi is shown most clearly by comparing the pleadings with the findings of fact by Shearman J. The plaintiff was a lodger in a tenant's flat and she tripped on a worn stair of the common staircase, through her heel catching in an iron bar at the edge of the step. The defendants in the defence denied that the step was dangerous and alleged that its condition was well known to the plaintiff. The learned judge found "that there was no "negligence on the part of the respondents; that no complaint "as to the state of the staircase had been made to the "respondents' caretaker or to anybody; that at the time of "the accident neither the staircase as a whole nor the particular "step on which the appellant fell was dangerous; that the "depression in which the appellant caught her heel was obvious "to anybody walking up or down the stairs and could have "been seen by the appellant if she had looked, and was "consequently not in the nature of a trap or concealed danger;" and on these findings he gave judgment for the respondents. Even if the plaintiff was an invitee and not a mere licensee, it seems to me that on those findings the defendants were entitled to judgment, and it is noteworthy that Lord Atkinson expressly said so, when he stated (1): "But even if the "plaintiff was in the position of an invitee of the defendants, "her rights and duties in that character would be those "described and measured by the well known passage from "Willes J.'s judgment in *Indermaur* v. *Dames*" (2). He then quoted the first two sentences of that passage: "The class "to which the customer belongs includes persons who go not "as mere volunteers, or licensees, or guests, or servants, or "persons whose employment is such that danger may be "considered as bargained for, but who go upon business "which concerns the occupier, and upon his invitation, express "or implied. And, with respect to such a visitor at least, "we consider it settled law, that he, using reasonable care on "his part for his own safety, is entitled to expect that the "occupier shall on his part use reasonable care to prevent

(1) [1923] A. C. 74, 86. (2) (1866) L. R. 1 C. P. 274, 288.

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"damage from unusual danger, which he knows, or ought to "know." Then Lord Atkinson said (1): "Lastly the learned "judge finds that no complaint was made by any of the "defendants' tenants that this staircase was out of repair, "nor did he think he could possibly find that the staircase as "a whole or that this particular place could be described in "plain English as dangerous." Lord Sumner said (2): "In law "I think that, if the place is plainly visible, as it was, the "plaintiff, being in full possession of her faculties, was bound "to look after herself, as she had always done before. If on "that day she was tripping down, I do not say carelessly but "free from care, and did not appreciate what was there for "her to see, this cannot in itself impose liability on the "occupiers or warrant a dissent from the trial judge's conclusions "of fact," and he added: "In this particular case, however, "it makes no difference to the liability whether she was the "defendants' licensee or their invitee." Lord Wrenbury (3) referred to the learned judge's findings of fact, which I have already mentioned, and he drew the conclusion (4) that on those facts the plaintiff could not recover. For these reasons I venture to think that the legal differences between the rights of a mere licensee and those of an invitee, or between the duties of a licensor and those of an invitor, were not in issue in that case and that the expressions of opinion thereon were truly obiter dicta.

It is sometimes said that invitation cannot be inferred unless a *common* interest obtains between invitee and invitor, but I see no legal ground for making community of interest an essential criterion. Possibly the idea arose from the words used by Willes J. in *Indermaur* v. *Dames* (5) when, referring to the facts of that case, he spoke of the plaintiff as "a person "on lawful business, in the course of fulfilling a contract in "which both the plaintiff and the defendant had an interest." I cannot see that the separate interest of the visitor necessarily affects the duty of the occupier. If the occupier has any interest of a business kind in the presence on his premises of the other person such as would naturally lead him to " invite " the visitor if he gave his mind to the question, it is, in my opinion, sufficient to cast on him that measure of care which the common law exacts towards an invitee. The invitation may be written, or spoken, or tacit and indicated only by conduct. In my humble opinion, differing from each of the three noble Lords in *Fairman's* case (1), the landlord of a block of flats must inevitably be interested in making his staircases and lifts available to persons desiring to visit his tenants, for if he did not provide those facilities of access he could not let his flats. Indeed, the provision of a lift is one of the " common services," as they are often called, which are essential to the successful prosecution of his business, and the word " lift," usually exhibited in the entrance hall, is itself an invitation from the landlord to the visitor to use it to get to the flat to which he is bound. For this reason, I hold that the plaintiff was an invitee of the landlord when he entered the lift.

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(1) [1923] A. C. 74, 88.
(2) Ibid. 92.
(3) Ibid. 95.
(4) Ibid. 98.
(5) L. R. 1 C. P. 274, 285.

On the scope of the occupier's duty to an invitee at common law there is to-day general agreement, except on one aspect, and if the plaintiff was, as I think, an invitee, the liability of the landlord to him as his invitee turns on that very point. Is it his duty to provide "reasonably safe premises," or only to "take reasonable care" to ensure that his premises shall be safe ? The former standard is higher than the latter, "a "limited duty of insurance, as one may call it " (Pollock on Torts, 14th ed., p. 406) and, it has been suggested, may involve responsibility for the act of an independent contractor. In Winfield on Torts, p. 581, note *d*, there are some judicial expressions to the former effect, but I do not know of any case where the point has been the ratio decidendi. In *Indermaur* v. *Dames* (2) Willes J. expressed it as a duty of care only, and I cannot see how on principle it can be put any higher. Alderson B.'s well known definition of negligence in *Blyth* v. *Birmingham Waterworks Co.* (3) was "the omission

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(1) [1923] A. C. 74.
(2) L. R. 1 C. P. 274, 288.
(3) (1856) 11 Ex. 784.

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"to do something which a reasonable man . . . . would do, "or doing something which a prudent and reasonable man "would not do," and the learned authors of Bullen & Leake, 3rd ed. (1868), p. 368, accepted that formula as their own view. Mr. Justice Oliver Wendell Holmes, when sitting as a puisne judge in Massachusetts, where English law still prevailed, in *Commonwealth* v. *Pierce* (1) expressed the same view, and that was only three years after the publication of his great book on the common law. He said: "So far as civil liability "is concerned, at least, it is very clear that what we have "called the external standard would be applied, and that if "a man's conduct is such as would be reckless in a man of "ordinary prudence, it is reckless in him. Unless he can "bring himself within some broadly defined exception to "general rules, the law deliberately leaves his idiosyncrasies "out of account, and peremptorily assumes that he has as "much capacity to judge and to foresee consequences as a "man of ordinary prudence would have in the same situation. "In the language of Tindal C.J.: 'Instead, therefore, of saying "'that the liability for negligence should be co-extensive with "'the judgment of each individual, which would be as variable "'as the length of the foot of each individual, we ought rather "'to adhere to the rule which requires in all cases a regard to "'caution such as a man of ordinary prudence would observe'." (*Vaughan* v. *Menlove* (2).)

Lancaster Canal Co. v. *Parnaby* (3) was an action by an invitee against a canal company for damages caused by a wreck left by the company in their canal. Tindal C.J., who delivered the judgment of a very strong Exchequer Chamber of seven judges, including Parke and Maule BB., said (4): "And the common law, in such a case, imposes a duty upon "the proprietors, not perhaps to repair the canal, or absolutely "to free it from obstructions, but to take reasonable care, so "long as they keep it open for the public use of all who may "choose to navigate it, that they may navigate without danger

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(1) (1884) 138 Mass. 165; 52 Amer. Rep. 266.

(2) (1837) 3 Bing. N. C. 468, 475.

(3) (1839) 11 Ad. & E. 223.

(4) Ibid. 243.

"to their lives or property. We concur with the Court of "Queen's Bench in thinking that a duty of this nature is "imposed upon the company, and that they are responsible for "the breach of it upon a similar principle to that which makes "a shopkeeper, who invites the public to his shop, liable for "neglect on leaving a trap door open without any protection, "by which his customers suffer injury." To put on the occupier any higher measure of duty than that of care, seems to me to depart from first principles. Whether on the true theory of the English law of torts the duty rests on a moral basis, or on a public policy which makes the actor take the risk of his act or omission if harm results to another, or whether those two factors have both combined in our legal history to affect the minds of the judges who have worked out our theory of responsibility for negligence to the stage of development which it has now reached does not seem to matter in the present appeal, for, whichever be the right view to take historically, the outlook or anticipation of the actor at the time when he acts must inevitably be one vital ingredient in the estimation of his duty. I am, of course, using the words "actor" and "acts" to cover omission as well as action. If, as a reasonably prudent man, the actor ought to have foreseen probable danger from his action to a person in the position of the plaintiff and hurt does result, then, on any of the three views, the imposition of liability is just, except in those cases where the actor is exercising a right already possessed by him. But to put on him a so-called " strict liability " similar to the responsibility of an insurer seems to me unjust unless there be present other circumstances which give rise to an exceptional measure of duty or make it right that the particular action should be at the peril of the actor, as in the case of dangerous chattels, such as guns or poisons, or of animals of a savage nature or known to the actor to be dangerous, and of acts within the *Rylands* v. *Fletcher* rule (1). These well-established types of cases where the law imposes a " strict liability " have, nevertheless, the same underlying feature as characterizes the duty of an occupier to his invitee. In all of them the actor foresees, or as a reasonable man ought to foresee, danger to persons so placed as to be likely to be affected but whom he has no right in law so to affect. They are all equally referable to the duty of care, although they call for a higher degree of care because of the greater degree of danger to others which their special circumstances make obvious to the actor. But I can see no ground for the law turning the ordinary occupier into such an insurer, and, indeed, the contractual metaphor involved in Sir Frederick Pollock's expression seems of itself to cast a doubt on the propriety of its application to the common law duty of " diligence " where consensual contract does not enter in. If, as I believe to be the case, there is no authority on this point binding on this court, it is unnecessary to go through the various decisions, and it is enough if I state the conclusion at which I have arrived. The invitor is bound to take that kind of care which a reasonably prudent man in his place would take—neither more nor less. The landlord of a block of flats, as occupier of the lifts, does not profess as such to be either an electrical or, as in this case, a hydraulic engineer. Having no technical skill he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. If he did not do so, he would, indeed, be guilty of negligence. To hold him responsible for the misdeeds of his independent contractor would be to make him insure the safety of his lift. That duty can only arise out of contract, as in the case of an employer's duty towards his employed which in certain cases may make him responsible for the structural fitness of the premises where they are to work.

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(1) (1868) L. R. 3 H. L. 330.

In the present case the landlord was ignorant of the mechanics of his hydraulic lifts and it was his duty to choose a good expert, to trust him, and then to be guided by his advice. I think that he realized his duty and wholly discharged it, so far as the safety of others was concerned, for he chose a first-class firm of lift engineers and trusted them, and over a long period of years and in connection with many lifts he found them trustworthy. His contract with them did not include alterations or repairs, but it called for regular reports, originally in writing after each visit, in later years orally whenever they thought such work was needed. The contract current at the time of the accident had been made by correspondence between May 27 and July 23, 1935, and was in the following terms: "Engineers to attend once every "calendar month during ordinary working hours to adjust, "clean and lubricate the mechanism of the lifts. To provide "the cleaning materials and necessary lubricants, also the "packing materials for the glands and leathers for the control "valves. To attend also at all reasonable times during normal "working hours to adjust the mechanism in the case of stoppage "or irregular running between the periodical visits. To "furnish signed reports after each periodical visit. Rates: "10*l*. per annum." The printed form of report shows the course of business. It left an open space before the signature for the insertion in ink of all requisite information as to any alterations or repairs which in the opinion of the engineers were necessary. The engineers had another form of contract which did, for a higher rate of agreed remuneration, include some repairs, but the form adopted by the landlord, supplemented by the customary report after each inspection, was plainly intended to give him full information about any repair or alteration needed, and not least if any possibility of danger had developed which made it unsafe to continue running the lift pending the necessary alteration or repair. [His Lordship then referred to the correspondence and facts which he had reviewed, and continued:] The engineers evidently had a very high reputation and wide practice as lift engineers, and I can see no ground whatever for doubting that the landlord took every reasonable precaution in trusting to their examining the lift with care and reporting to him if there was any indication of danger. The landlord thus duly performed his whole duty of care to the plaintiff and others using the lift, even if they were his invitees, by contracting with the engineers and then leaving the expert problems, of which he was ignorant, entirely to his experts who possessed the requisite knowledge. If he did not fail in his duty to an invitee, a fortiori he did not fail if the plaintiff was a mere licensee.

The learned judge conceded that the landlord had committed no breach of duty if the plaintiff was to be regarded as a mere licensee, but he thought that, although the plaintiff entered the building as such, yet when he entered the landlord's lift his position changed from that of a licensee to one equivalent in law to that of a passenger carried gratuitously in a vehicle, for he held that the lift was a carriage, there being no difference in law between horizontal and vertical transport. That view may or may not be right in law, but it would place no higher duty on the carrier who extends a gratuitous invitation than that which the occupier owes to an invitee whom he invites to enter his premises. Hilbery J. obviously so thought, but, treating the plaintiff as if he were an invitee, he thought that he saw ground for liability in two other considerations, which perhaps he did not keep sufficiently distinct in his mind. One was that the landlord ought to have realized from the correspondence of the autumn of 1939 that his engineers were warning him of danger; the other was that the landlord did not in fact allow himself to be guided by the engineers' advice. These considerations would together have been fatal to the landlord if he had been really warned by his experts of the presence of danger, but the truth is that they did not warn him of any such thing for they did not think there was any danger. As regards the second, there was no evidence of the landlord's not allowing himself to be so guided in any matter which the engineers ever suggested affected any question of safety. The landlord's appeal must, therefore, in my opinion be allowed.

I now turn to the question of the engineers' liability. Mr. Sellers for them had an arduous task. He was faced with two serious obstacles in his logical ascent to safety which had to be climbed or circumvented. He wanted to say that our law of negligence is nothing but a catalogue of particular duties, a list which is crystallized for ever and cannot be enlarged by judicial legislation, and that *Donoghue* v. *Stevenson* (1) did but add one more to the list, although on what principle of the common law it came to be added he did not venture to

(1) [1932] A. C. 562.

expound. He also wanted to say that *Donoghue* v. *Stevenson* (1), rests on no such general principle as is needed to make its decision about manufacturers extend so as to include within its ambit repairers, if that word may be used, not quite accurately perhaps, to describe the engineers in the present case, and to put on them the duty of care towards a person in the position of the plaintiff. In my opinion, Mr. Sellers had no legal warrant for either proposition. Both are erroneous. The historical investigation made by the late Mr. Justice O. W. Holmes in his book on the Common Law, especially chap. iii., on Negligence, was addressed to finding out the real basis of our law of torts. By it he demonstrated the fallacy of the first of the two propositions which Mr. Sellers needed to establish, for he showed that, although the English theory of torts had grown up first through forms of actions and then through particular decisions, an analysis of our year books and generally of our case law down to 1881 discloses the gradual emergence of legal principles as its basis, and, perhaps, one may say especially so with regard to the law of negligence. By his book he made as great a contribution to the elucidation of principle as any one man had ever made up to then, and I believe his work greatly helped the free and natural development of English common law.

In *Donoghue* v. *Stevenson* (1), Lord Buckmaster strove to establish Mr. Sellers' second proposition, but failed to convert the House. In the result, in my humble opinion, the three majority opinions refute both of Mr. Sellers' propositions, each of which seems to me essential to the argument presented by him, and in fact they establish our law of negligence on the firm foundation of general principle. Lord Esher in *Heaven* v. *Pender* (2), had made a valiant effort to show that a general principle does underlie one important section of the law of negligence, although he was not trying to formulate any complete definition of the relevant duty. His effort was treated by Cotton and Bowen L.JJ., and has been by others since then, in a way which was logically unjust, for they

(1) [1932] A. C. 562.

(2) (1883) 11 Q. B. D. 503.

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interpreted him as trying to do what I do not think he ever purported to do. In *Le Lievre* v. *Gould* (1), he himself showed, as I think, that he had not intended in *Heaven* v. *Pender* (2) what he is supposed to have intended, namely, to make an exhaustive definition which would operate as a test in all cases. Some have supposed that in the later case he intended to limit his previous observations to the particular occasions of liability which he mentioned in the later case. This seems to me equally unfair to him in the other direction. As I read his remarks, he was only intending to give illustrations of the kind of occasion where his principle would obviously come into operation. In *Donoghue* v. *Stevenson* (3), Lord Atkin rescued him from undeserved obloquy and put his pronouncement in *Heaven* v. *Pender* (2) into its true perspective. So also did Lord Macmillan (4). Lord Atkin, after his full historical review of the authorities, made it clear that he arrived at his conclusion on the duty of manufacturers by the road of first principles, although he took care to prevent misconception such as Lord Esher had encountered by pointing out the limits within which the principles he enunciated would find practical application.

Thus it follows, in my opinion, that Mr. Sellers finds himself defeated by both the obstacles which lay in the path of his necessary argument. I feel diffidence in giving expression to any comment on *Donoghue* v. *Stevenson* (3), since, in my opinion, that decision is an authority directly binding this court in the present case. The basis of the decision was a principle which, as there enunciated, amply suffices to justify the judgment of Hilbery J., in the present case against the engineers. Accepting the principle to the full, I content myself with a few quotations. Lord Atkin (5) made it clear that he was seeking for authority on the principles to apply to the case in hand, and he said (6): "And yet the duty "which is common to all the cases where liability is established "must logically be based upon some element common to the

(1) [1893] 1 Q. B. 491.
(2) 11 Q. B. D. 503.
(3) [1932] A. C. 562, 581.
(4) [1932] A. C. 614.
(5) Ibid. 579.
(6) Ibid. 580.

"cases where it is found to exist. To seek a complete logical "definition of the general principle is probably to go beyond "the function of the judge, for the more general the definition "the more likely it is to omit essentials or to introduce non-"essentials. The attempt was made by Brett M.R., in "*Heaven* v. *Pender* (1), in a definition to which I will later refer. "As framed, it was demonstrably too wide, though it appears to "me, if properly limited, to be capable of affording a valuable "practical guide. At present I content myself with pointing "out that in English law there must be, and is, some general "conception of relations giving rise to a duty of care, of which "the particular cases found in the books are but instances." On the same page he brings out one, perhaps the most essential, test : " The rule that you are to love your neighbour becomes "in law, you must not injure your neighbour ; and the lawyer's "question : Who is my neighbour ? receives a restricted reply. "You must take reasonable care to avoid acts or omissions "which you can reasonably foresee would be likely to injure "your neighbour. Who, then, in law is my neighbour ? The "answer seems to be—persons who are so closely and directly "affected by my act that I ought reasonably to have them "in contemplation as being so affected when I am directing "my mind to the acts or omissions which are called in "question." That is the same testing principle which shines out so strongly in the third chapter of Holmes' Common Law. Lord Atkin repeats it in slightly different words (2) : " It is "sometimes said that the liability in these cases depends upon "an invitation by the defendant to the plaintiff to use his "chattel. I do not find the decisions expressed to be based "upon this ground, but rather upon the knowledge that the "plaintiff in the course of the contemplated use of the chattel "would use it ; and the supposed invitation appears to me "to be in many cases a fiction, and merely a form of expressing "the direct relation between the supplier and user which gives "rise to the duty to take care." He proceeded on his search and continued his historical analysis of the cases to the end of his judgment. In the course of it time after time he made it clear that he was engaged in extracting the true metal of principle from the ore of the particular cases which he was passing in review. With regard to *Winterbottom* v. *Wright* (1) (important because it was the authority on which *Earl* v. *Lubbock* (2) was decided, as is seen by the judgment of Lord Collins M.R. (3)), Lord Atkin, agreeing in this with Lord Buckmaster, says (4): "It is to be observed that no negligence "apart from breach of contract was alleged—in other words, "no duty was alleged other than the duty arising out of the "contract; it is not stated that the defendant knew, or ought "to have known, of the latent defect."

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(1) 11 Q. B. D. 503, 509.

(2) [1932] A. C. 585.

After Lord Atkin's very full review of all the cases, and the entire concurrence in his opinion expressed by Lord Thankerton and Lord Macmillan, I conceive that it would be not only futile but improper for me to re-discuss any of the cases which he reviewed, for I could only do it to emphasize the very principle which Lord Atkin has already made clear since it is the application of that principle which shows that the engineers have by the conduct of their mechanic committed a breach of their duty towards the plaintiff. But I cannot refrain from noticing a curious repetition of history. Lord Atkin's exposition of principle has met with the same unfair criticism, although less in degree, as that which Lord Esher's exposition evoked: see per Scrutton L.J. in *Farr* v. *Butters Bros. & Co.* (5), and Prof. Stallybrass in his last edition (the ninth) of Sir John Salmond's Torts, at p. 459. It is because the critics have fallen into the error, as in the case of Lord Esher, of assuming that Lord Atkin was intending to formulate a *complete* criterion, almost like a definition in the prolegomena to a new theory of philosophy. Does not such criticism miss the real value of attempts to get at legal principle? The common law of England has throughout its long history developed as an organic growth, at first slowly under the hampering restrictions of legal forms of process, more quickly in Lord Mansfield's time, and in the last one hundred years

(1) (1842) 10 M. & W. 109.
(2) [1905] 1 K. B. 253.
(3) Ibid. 255.
(4) [1932] A. C. 589.
(5) [1932] 2 K. B. 613, 614.

at an ever increasing rate of progress as new cases, arising under new conditions of society, of applied science and of public opinion, have presented themselves for solution by the courts.

It is worth noticing that in *Donoghue* v. *Stevenson* (1) Lord Buckmaster treated the repairer as in consimili casu to the manufacturer. He recognized that the principle which he denied to the common law must, if it exists at all, apply to the repairer as well as to the manufacturer. The fact that he regarded that similarity as a reason for rejecting the principle does not lessen the force of the reasons for saying that, if it does apply to the one, it must also apply to the other.

The only point in the present case which was left open in *Donoghue* v. *Stevenson* (1), is the criterion of "remoteness," to use the only word which, for want of a better one, is available. Tucker J. discussed it fully in *Herschtal* v. *Stewart & Ardern, Ld.* (2), and in order not to extend this overlong judgment I content myself with saying that I find myself in general agreement with that closely reasoned judgment, and I merely add that, if ever there was a case where a repairer, when sending out for immediate use a machine in a condition made dangerous by his professional want of skill or care, could not and would not "reasonably anticipate any intermediate "examination before use," it is the case of a repair to a lift which is intended to be used by a non-expert porter as soon as the repair is finished for taking people up to a higher floor.

The facts of this case, therefore, in my opinion, clearly show that the engineers did owe a duty of care to any person using the lift in the ordinary way up to the time of their next examination of it, for they realized, or ought to have realized, that no effective examination was in the least likely before then. The order of the court will be that the appeal of the landlord be allowed and judgment entered for him with costs here and below, that the appeal of the engineers be dismissed with costs, the costs of the landlord in the court below to be paid direct to him by the engineers.

(1) [1932] A. C. 562, 577.

(2) [1940] 1 K. B. 155.

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CLAUSON L.J. [read by GODDARD L.J.]: I have had the advantage of reading the judgment which Goddard L.J. is about to deliver. For the sake of brevity I desire to adopt as my own his statement of the facts and also the conclusions which he reaches as regards the failure of the plaintiff to establish a case for damages against the landlord. I agree with Goddard L.J. that it becomes unnecessary to determine whether the plaintiff was a licensee or an invitee. In the present case there is no information before the court as to the contractual liability, if any, as between the landlord and the tenant whom the plaintiff was visiting to provide a lift for the tenant's visitor. I wish to reserve the question whether a breach of that contractual liability might affect the position of the landlord as between himself and the visitor.

I now turn to the question whether the plaintiff has established a cause of action for damages against the engineers. As I understand it, the liability of the repairers to the plaintiff is sought to be established by applying to the facts of this case the principle affirmed by the House of Lords in *Donoghue* v. *Stevenson* (1). That principle is thus stated by Lord Atkin (2): "A manufacturer of products, which he sells in such a form "as to show that he intends them to reach the ultimate "consumer in the form in which they left him with no "reasonable possibility of intermediate examination, and with "the knowledge that the absence of reasonable care in the "preparation or putting up of the products will result in an "injury to the consumer's life or property, owes a duty to the "consumer to take that reasonable care." It is to be gathered from Lord Thankerton's opinion (3), that, in his Lordship's view, the essential element in the case which made it necessary to recognize a relationship existing as between the manufacturer and the consumer of such a character as to give rise to the duty of the former towards the latter to exercise care was the manufacturer's own action in bringing himself into direct relationship with the injured consumer. His Lordship explains (4) that that action was to be inferred from the fact

(1) [1932] A. C. 562.
(2) Ibid. 599.
(3) Ibid. 603, 604.
(4) Ibid. 603.

that the manufacturer, in placing his manufactured article on the market, had intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods that he had, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer was entitled to rely on the exercise of diligence by the manufacturer to secure that the article should not be harmful to the consumer. It appears from Lord Macmillan's opinion (1) that, to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other, reference is to be made to the standards of the reasonable man. Assuming negligence to be established, those standards must be appealed to in order to ascertain whether the party attacked owed a duty and to whom he owed the duty. In the case under citation, his Lordship found the necessary relation between the defendant and the plaintiff to be established by reason of the fact that the defendant was engaged in the business of manufacturing articles for human consumption in the form in which he issued them, and, by reason of that fact, placed himself for his own ends in a relationship with all potential consumers of the articles, and thus a duty was imposed on him to take care to avoid injuring them. For the reasons thus summarized, his Lordship was of opinion that the defendant, manufacturing articles for human consumption, owed to the consumers whom he had in view a duty of care in the manufacture.

The principles to be found in the opinions of the majority of their Lordships in *Donoghue* v. *Stevenson* (2), were discussed and further expounded by the Judicial Committee of the Privy Council in *Grant* v. *Australian Knitting Mills, Ld.* (3). Their Lordships' judgment clarifies the question, which was much discussed before us, as to the relationship, if any, between the manufacturer or repairer of an article, on the one hand, and, on the other, the persons to whom the immediate customer of the manufacturer or repairer intends, in the way

(1) [1932] A. C. 562, 619.
(2) Ibid. 562.
(3) [1936] A. C. 85.

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of his trade or business, to give permission to use the article. The question was not strictly relevant to the decision in *Grant* v. *Australian Knitting Mills, Ld.* (1), but their Lordships deal with the point (so far as a manufacturer is concerned) when rejecting the argument placed before them by counsel that there was no half-way house between confining the application of the principle of *Donoghue* v. *Stevenson* (2) to cases exactly on all fours with it and extending it in such a way as to leave manufacturers liable for damages of an indefinite amount after an indefinite time to claimants indeterminate until that indefinite time arises. Their Lordships pointed out that the solution of the suggested difficulty is to be found in the application in proper cases, not always according to strict logic, of the well-established rule that cause and effect must not be too remote.

In view of these authorities, it appears to me that it is the duty of the court to examine the facts of the case, and, if the plaintiff establishes the defendant's negligence and also proves that the damage he has suffered has been caused by that negligence (and in the present case I am satisfied that the plaintiff has established both points), to determine whether, having regard to what has in fact occurred between the negligence so established and the casualty which was the occasion of the damage suffered, the cause and effect are too remote. In examining the matter the court will be investigating the particular relation between the defendant and the plaintiff which gives rise to the duty which is alleged to be owed by the defendant to the plaintiff, and, in particular, whether or not that relation is too remote to give rise to the duty, and in that examination the court will be guided (as Lord Macmillan pointed out in *Donoghue* v. *Stevenson* (2)), by the standards of the reasonable man, and will not be bound (as their Lordships pointed out in *Grant* v. *Australian Knitting Mills, Ld.* (3)), by the rules of strict logic.

In the present case, the machine was not in fact in first class condition, the ram being worn and scored, but it was to be repaired so as to make it safe. It was repaired, but

(1) [1936] A. C. 85. (2) [1932] A. C. 619. (3) [1936] A. C. 85, 107.

negligently repaired in that a particular gland was imperfectly adjusted, with the result that, in the running of the machine, owing in part to the state of the ram and in part to the maladjustment of the gland, stresses were set up in the structure of the gland in question which in fact resulted, after the machine had been handed over to the person on whose orders it had been repaired, and had been used by the latter's servants for the conveyance of passengers in the ordinary way for about a day, in the gland being fractured and the machinery giving way, with consequent injury to the plaintiff who happened to be in the lift at the moment of the occurrence. The importance of the maladjustment, and, accordingly, the degree of negligence in it, is, of course, emphasized by the speed with which its effects manifested themselves in the catastrophe, but I shrink from the conclusion that the relationship between the plaintiff and the defendant can be modified by a consideration of the magnitude of the negligence. The magnitude of the negligence must be irrelevant to the question of the existence of the relationship. The crucial point seems to me to be whether, in the case of repair of a machine which the man who orders the repairs is intended, in the way of his trade or business, to permit others to use without any reference to the repairer, the reasonable man would regard it as reasonably contemplated by the parties that the repairer is to remain liable, after he has delivered over the machine to his immediate employer, to any one but that employer for the damage traceable to his negligence which may be occasioned, while that employer is working the machine, to such persons as the employer may happen to permit to use it. In the present case there is no evidence or, indeed, suggestion, that the repairer took any action, such as Lord Thankerton found in *Donoghue* v. *Stevenson* (1), to bring himself into direct relationship with the injured plaintiff, or that any step whatever was taken by the repairer or his employer to bring into being any relationship between the repairer and the potential users. I venture to repeat, with slight verbal alterations to suit the facts of the present case, the words of Mathew L.J. in

(1) [1932] A. C. 603.

Earl v. *Lubbock* (1), words approved, as I read it, by Lord Atkin in *Donoghue* v. *Stevenson* (2), and by their Lordships of the Privy Council in *Grant* v. *Australian Knitting Mills, Ld.* (3): "The argument of counsel for the plaintiff was that the "defendant had been negligent in the performance of the "contract (scil. to repair the machine) with the owner of the "machine, and that it followed as a matter of law that any "one who sustained an injury traceable to that negligence had "a cause of action against the defendant. It is impossible "to accept such a wide proposition, and, indeed, it is difficult "to see how, if it were the law, trade could be carried on. "No prudent man would contract to make or repair what the "employer intended to permit others to use in the way of his "trade."

For these reasons I feel unable to hold that the plaintiff has established any such relationship between himself and the engineers, as entitles him to recover damages against them in respect of his injuries, and, accordingly, in my judgment, the appeal of those defendants also should, as in the case of the landlord, be allowed, and judgment should accordingly be entered for both defendants with costs.

GODDARD L.J. The facts which appear to me to be material in this case are: (1.) On June 19, 1940, the plaintiff sustained injury by the collapse of a lift at a block of flats owned by the landlord, of whom the tenants of the various flats held them, and the lift was worked by a porter in his service. (2.) The plaintiff had gone to the flats on business which the firm of solicitors by whom he was employed had with one of the tenants, and not on the business of the landlord. (3.) The porter invited the plaintiff to enter the lift and accompanied him into it and set it in motion. I use the word "invited" not as importing any legal consequence or relation, but merely in the colloquial sense. (4.) On April 25, the lift had been subjected to a periodical inspection by the landlord's insurance company, who had reported that it had been found to be generally in good working order. (5.) The day before the accident work had been done upon it by the engineers, who are competent lift engineers and undertake its care and maintenance. I shall refer hereafter in more detail to the contract under which they had been attending to the lift. (6.) The cause of the lift falling was due to the fracture of a gland. The fracture was due to two factors, each of which contributed materially to the accident. One was that the gland, after being repacked, had been refixed on the ram out of truth, or, as it was described at the trial, at a tilt; the other was that the ram was worn and scored. Whether either of these causes without the other would have caused the gland to fracture does not seem to have been expressly found by the learned judge, but I do not think anything turns on this. It is enough to say that fixing the gland at a tilt on the scored ram caused the former to break. (7.) The landlord did not know that the lift was in a dangerous condition. I understand the findings of the learned judge to mean that he ought to have known of the danger, but, in my opinion, there was no evidence on which he could find this.

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(1) [1905] 1 K. B. 259.
(2) [1932] A. C. 592.
(3) [1936] A. C. 107.

The cause of the danger was such that it would not be apparent to the plaintiff, and the question whether the landlord ought to have known of its existence is of vital importance as regards his liability if the legal relationship between him and the plaintiff is that of invitor and invitee. Although I do not think that it was, I will give my reasons for saying that, in my opinion, there was no evidence on which it could be held that the landlord ought to have known of it. He adopted the usual and sensible course of employing a firm of repute to inspect and look after the lifts on the various premises which he owned. In the case of this particular block of flats the contract which he made provided that the engineers should attend each month to adjust, clean and lubricate the mechanism, and, as they had to provide packing material, it was obviously contemplated that any necessary repacking of the machinery should be done by them, as in fact it always was. They had also to come and adjust the mechanism at any time when stoppage or irregular running occurred.

They had to furnish special reports after each periodical visit. Clearly, had any danger been apparent, it would be their duty to report it, nor did they contend otherwise. The learned judge, however, has laid great stress on the fact that there was another class of contract which the landlord could have made under which the engineer would have undertaken repairs and necessary renewals, and he apparently considers that, because this form was not adopted, the landlord cannot be said to have put himself into the hands of the engineers, and cannot, therefore, rely on their employment by him as discharging any duty of care. With all respect, I think that this is a false point. The alternative contract merely provides for the quantum of work which the engineers had to undertake in return for an increased fee. In the one case they would report what ought to be done, and the landlord would have to pay for it if he decided to have it done; in the other, the engineers would have to do it for their inclusive fee. The adoption of the less expensive contract in no way lessened the duty of the engineers to report any danger which was or ought to have been apparent to them as experts.

In October, 1939, the landlord complained of the slow running of the lift, and on November 8 of that year, the engineers sent a long report advising that new top and bottom rams should be fitted as they were badly worn and scored. It is, however, clear that this was advised, not as a matter of safety, but—(*a*) to correct the slow running, and (*b*), because this condition made frequent repacking necessary, which was an expensive business for the engineers. There was nothing at all to suggest to the landlord that there was any element of danger in the condition of the rams, and Laing, who had charge of this work for the engineers, has stated more than once in his evidence that he never anticipated or considered that there was any danger. The engineers suggested, owing to war-time difficulties in getting new material for the rams, a second visit each month to grease the rams at a small extra fee, and to this the landlord assented. The only possible conclusion seems to me to be that no question of safety ever arose in the mind of either the engineers or the landlord, that the former suggested that they would keep the lift running satisfactorily, and that the latter assented to it. There is also the fact that the insurers had no fault to find with the lift when they made their periodical inspection on March 31, and, of course, safety would be the main consideration to which they would direct their inspection. The learned judge has found, rightly in my opinion, that the landlord did not know there was danger, and, in my opinion, there is nothing in the evidence to support a finding that he ought to have known that there was.

This brings us at once to the question of what duty was owed by the landlord to a person who came to the flats and used the lift to visit a tenant and not on the business of the landlord. Now I confess that, were it not for authority which binds me, I should be strongly tempted to hold in the case of flats and offices that, having regard to modern conditions of life and business, the plaintiff ought to be regarded as an invitee. Lord Sumner put the matter tersely in *Mersey Docks and Harbour Board* v. *Procter* (1), where he said: "The leading distinction between an invitee and a "licensee is that, in the case of the former, invitor and invitee "have a common interest, while, in the latter, licensor and "licensee have none." In the case of blocks of offices in the city of London, everyone knows that lifts are running all day not only for the use of the tenants but for that of their clients and customers. The landlord must provide facilities and conveniences to enable his tenants to carry on their business if he wants to let the offices and keep his tenants. Surely he would prejudice his prospects of letting on favourable terms a second or third floor office to a stockbroker, solicitor or merchant were he to say: "Understand now, the lift is for "you only. I do not undertake to allow your clients, or even "your clerks, to use it. I may do so as a matter of grace, but "that is all." The more convenient and attractive he can make his property for persons resorting thereto on business, the better rent he can obtain. This applies equally to the case of residential flats, where tenants expect and require facilities for their visitors, whether on business or social calls.

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(1) [1923] A. C. 253, 272.

If, then, it is in the landlord's interest to provide facilities for those who desire to visit his tenants, I should incline to the opinion that the relationship between landlord and visitor was that of invitor and invitee, but, unless I have wholly misunderstood *Fairman* v. *Perpetual Investment Building Society* (1), I do not think it is open to me so to hold. That case concerned a block of flats, access to which was obtained by a staircase under the control of the owners. The person who met with an accident on the staircase was the lodger and sister of one of the tenants. While there was a difference of opinion as to the effect of the evidence, it seems to me that all the noble and learned Lords who gave opinions in that case thought that the plaintiff fell into the category of a licensee and not an invitee. They overruled *Miller* v. *Hancock* (2), a case which has been subject to much criticism and which, again, concerned a staircase at a block of flats. For this purpose I can see no distinction between a staircase and a lift, which are merely alternative methods of access. Both Lord Sumner (3), and Lord Wrenbury (4), say in terms that the plaintiff was a licensee and not an invitee of the landlords, and although they said that in that particular case it made no difference whether the plaintiff was the one or the other, I cannot regard their views on this matter as being merely obiter. If they were, I think it is for the House of Lords and not for this court to say so.

Accordingly, as vis-a-vis the landlord the plaintiff was merely a licensee, the only duty which the former owed was not to expose him to, or to warn him of, a danger, of which he, the licensor, was aware. It is, I think, generally conceded that when, in *Robert Addie & Sons* (*Collieries*), *Ld*. v. *Dumbreck* (5), Lord Hailsham, in stating the duty owed by a licensor, spoke of a danger which was known or ought to be known to an occupier, he used these latter words per incuriam: see *Ellis* v.

(1) [1923] A. C. 74.
(2) [1893] 2 Q. B. 177.
(3) [1923] A. C. 92.
(4) [1923] A. C. 95.
(5) [1929] A. C. 358, 365.

Fulham Borough Council (1), as all the authorities are consistent on the point that a licensor's duty is only to give warning of dangers of which he actually knows. But the learned judge has held that, as the landlord undertook the conveyance of the plaintiff in a moving vehicle, he owed him a higher duty. That he owed him a duty to exercise care in the actual working of the lift none will deny, but did he owe a duty to a licensee to exercise care to see that a lift which he believed to be safe and had no reason to think was in any way a source of danger was in fact safe? I cannot think so. I agree with Hilbery J. in thinking that the matter may be tested by comparison with the ordinary case of carriage of passengers, although I disagree with his conclusion. If A agrees to drive B to the station in his car for reward, A owes a duty to B to take care that the car he provides for this purpose is safe. But, if B stops A in the street and asks for a lift, A is under no duty before acceding to his request to take care to see that some danger of which he is not then aware is not present in the condition of his car. In my opinion, a person who asks for and is given a gratuitous ride in a vehicle, whether in the horizontal or vertical plane, takes the vehicle as he finds it and is only entitled to warning of a danger of which the owner is aware. The learned judge relies expressly on *Harris* v. *Perry & Co.* (2), but when the facts of that case are examined I think it is clear that it is to be regarded as depending on an act of negligence during the transit. Of course, if I give a person a lift in my car I must drive with due care, but that is very different from being under a duty to use care to see that the car is in a safe condition before I let him get in when I have no reason to believe that it is not. The exact point arose in *Moffatt* v. *Bateman* (3), where the plaintiff accepted a ride in a carriage, the kingbolt of which broke, and the defendant was held not to be liable for the injuries which the plaintiff sustained. I may also refer to *Coughlin* v. *Gillison* (4), and, by way of contrast, to *Hyman* v. *Nye & Sons* (5), where an accident occurred

(1) [1938] 1 K. B. 212, 221.
(2) [1903] 2 K. B. 219.
(3) (1869) L. R. 3 P. C. 115.
(4) [1899] 1 Q. B. 145.
(5) (1881) 6 Q. B. D. 685.

to a carriage which had been hired by one of the plaintiffs from the defendants for reward. A bolt broke, and the defendants were held liable, it being their duty to supply a carriage as fit for the purpose as skill and care could render it. In my opinion, therefore, as the plaintiff vis-a-vis the landlord was only a licensee, he cannot recover.

But, even assuming that the plaintiff is to be regarded as an invitee, I think that his claim must fail. Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe. I need not quote the classic passage from the judgment of Willes J. in *Indermaur* v. *Dames* (1), but he there points out that whether reasonable care has been taken is to be determined as a matter of fact. It seems to me that, by employing a first class firm of lift engineers to make periodical inspections of the lift, to adjust it and to furnish reports upon it, the landlord did all that a reasonable man could do towards seeing that it was safe, especially when it is remembered that he also had the advantage of quarterly inspections by the insurance company's engineer. But it is argued that, if the engineers were negligent, it cannot be said that the occupier has discharged his duty. With this I cannot agree. An occupier or any other person may have, either by contract or by law, such a degree of duty imposed on him that he cannot discharge it by employing a contractor to do work for him, but where the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of competent contractors. Indeed, one may well ask how otherwise could the duty be discharged ? This was the opinion of Horridge J. in *Morgan* v. *Incorporated Central Council of the Girls' Friendly Society* (2), and I agree with it. It may well be that, if the duty arises out of contract, a higher degree is required. It may, for instance, be that, as between landlord and tenant as a result of contract, the former agrees to supply a lift as safe as skill and care can make it, as in *Hyman* v. *Nye & Sons* (3) quoted above. "Contractual obligations

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(1) L. R. 1 C. P. 274, 288.
(2) [1936] 1 All E. R. 404.
(3) 6 Q. B. D. 685.

"stand apart," said Hamilton L.J. in *Latham* v. *Johnson* (1), and the subject was dealt with at length by McCardie J. in *Maclenan* v. *Segar* (2). Where, however, the duty is not contractual but that which the law attaches to an invitor, I am satisfied that in such a case as the present he can discharge it by employing a competent expert. Indeed, I do not think that Hilbery J. would have decided otherwise but for the view which he took about the contract between the landlord and the engineers and for the fact that he thought the landlord ought to have appreciated that the lift was in an unsafe condition. I need not state again my reasons for disagreeing with him on these two matters.

I now turn to the question of the engineers' liability, which depends, I think entirely, on whether the principle of *Donoghue* v. *Stevenson* (3) applies to the case of a repairer as it does to a manufacturer of chattels, when, from the nature of the case, it appears that there is no reasonable opportunity for the examination of the chattel after the repair is complete and before it is used, and when the use by persons other than the person with whom the repairer contracted must be contemplated or expected. The plaintiff contends that it does, and that this view has been taken on more than one occasion by courts of first instance. The engineers contend that it is the principle of *Earl* v. *Lubbock* (4) which governs this case, and that *Donoghue* v. *Stevenson* (3) expressly recognizes the correctness of that decision. I believe that this is the first time that the question has come before an appellate court, and, accordingly, we must examine with care the principle on which *Donoghue* v. *Stevenson* (3) depends.

It is to be observed that the two noble and learned Lords who formed the minority in that case thought that the decision must necessarily apply to a repairer. I think that it may be said that this appears to have been one of the reasons for their dissent. Lord Buckmaster, said (5): "The principle "contended for must be this: that the manufacturer, *or indeed*

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(1) [1913] 1 K. B. 398, 410.
(2) [1917] 2 K. B. 330.
(3) [1932] A. C. 562.
(4) [1905] 1 K. B. 253.
(5) [1932] A. C. 577.

"*the repairer*," [the italics are mine] "of any article, apart "entirely from contract, owes a duty to any person by whom "the article is lawfully used to see that it has been carefully "constructed," and Lord Tomlin (1) expressed the same view. Taken alone, the sentence would state the proposition too widely, for it omits the all-important qualification that the liability is only said to exist where there is no reasonable opportunity for inspection of the chattel between its leaving the hands of the manufacturer or repairer and its consumption or use. I pause here for a moment to say that I think that it is generally considered that when Lord Atkin used the expression "reasonable possibility" with relation to inspection, he meant possibility in a commercial sense, and, as I ventured to say in *Paine* v. *Colne Valley Electricity Supply Co., Ld.* (2) the word "probability" might perhaps be used instead. One should, I think, ask oneself the question: "In the circum-"stances of any particular case ought the purchaser, or, in the "case of repairs, the person for whom the repairs were done, "to have made inspection for himself?" Apart from the question whether *Earl* v. *Lubbock* (3) is still good law, the contention of these defendants, as I understand it, is that the true principle underlying *Donoghue* v. *Stevenson* (4) is that it was to the interest of the manufacturer that his goods should reach the consumer unopened and it was his intention that they should, and that this was the reason for privity or proximity or direct relationship, call it what you will, being established between the manufacturer and ultimate consumer. On the other hand, it is said that the governing factor is the possibility or probability or contemplation that an inspection would take place before the goods were put into use. For my part, I think the latter proposition is the truth, and for this conclusion I find support in the advice of the Judicial Committee in *Grant* v. *Australian Knitting Mills, Ld.* (5). The corpus delicti in that case was a pair of underpants. Had they been washed before use, no ill-effects would have

(1) [1932] A. C. 599.

(2) (1938) 55 Times L. R. 181, 184.

(3) [1905] 1 K. B. 253.

(4) [1932] A. C. 562.

(5) [1936] A. C. 85.

resulted. I cannot see that it matters one iota to a manufacturer whether a purchaser washed them before use or not, from the point of view of his interest in the sale. I can well understand, however, that a canner of food or a manufacturer of mineral water has an interest in his products not being opened by anyone but the consumer, as the product would otherwise be injured. Equally, I have no doubt that some rather particular people would have new underclothes washed before using them. But in *Grant* v. *Australian Knitting Mills, Ld.* (1), Lord Wright disposed of the matter in a sentence: "It was not contemplated that they should "be first washed." If, then, there was any doubt about the governing principle of *Donoghue* v. *Stevenson* (2), Lord Wright has dissipated it. The manufacturer was held liable, not because he was interested in his product being used as it left his factory, but because he had no reason to contemplate an examination by the retailer or ultimate buyer before use.

Believing, as I do, that this is the governing principle, it follows that, in my opinion, *Dransfield* v. *British Insulated Cables, Ld.* (3), was wrongly decided, although I do not propose to burden this judgment with a discussion of that case. On what sound principle, then, can the case of a repairer be distinguished from that of a maker of an article? Of course, the doctrine does not apply to the repair of any article any more than to its manufacture. If I order my tailor to make me a suit, or a watchmaker to repair my watch, no one would suppose that anyone but myself was going to use the suit or watch. If the tailor left a large needle in the lining and it injured a person to whom at some time I lent the coat, I should think that the latter could not recover against the tailor. The relationship would be altogether too remote, and many of the suggested difficulties of *Donoghue* v. *Stevenson* (2) disappear if it is realized that the decision was, as I venture to believe, essentially one on the question of remoteness. But the case of a lift repairer is very different. A lift in a block of flats is there to be used by the owner and his servants, the

(1) [1936] A. C. 105.
(2) [1932] A. C. 562.
(3) (1937) 54 Times L. R. 11.

tenants and their servants, and all persons resorting thereto on lawful business. Blocks of flats and offices are frequently owned by limited companies who would be contracting parties with the lift engineers. In such a case, the employer would be the one " person " who could by no possibility use the lift. If the repairers do their work carelessly, or fail to report a danger of which they as experts ought to be aware, I cannot see why the principle of *Donoghue* v. *Stevenson* (1) should not apply to them.

But it is said that *Earl* v. *Lubbock* (2) is a direct authority that, in such a case, no duty is owed by the repairers to anyone except the person with whom they made the contract, and that the decision is expressly approved in *Donoghue* v. *Stevenson* (1). In my opinion, however, this is not so. I think that both Lord Atkin and Lord Macmillan dealt with *Earl* v. *Lubbock* (2) as showing that where the duty, the breach of which is alleged, arises solely out of contract, the duty cannot be owed to anyone who was not a party to the contract. Lord Atkin started his consideration of the case by saying (3): "The Master of the Rolls, Sir R. Henn Collins, "said that the case was concluded by *Winterbottom* v. "*Wright* (4). In other words, he must have treated the duty "as alleged to arise only from a breach of contract; for, as "has been pointed out, that was the only allegation in "*Winterbottom* v. *Wright* (4), negligence apart from contract "being neither averred nor proved." And when the noble and learned Lord expresses his approval of the judgment of Mathew L.J., he is, as I understand his speech, again confining his approval to that aspect. Lord Macmillan (5), speaking of *Earl* v. *Lubbock* (2), says in terms that "the case turns upon "the rule that a stranger to a contract cannot found an action "of tort on a breach of that contract." It is perfectly true that both *Winterbottom* v. *Wright* (4) and *Earl* v. *Lubbock* (2) were presented as actions arising out of tort and not as breaches of contract, but the duty in both cases was alleged

(1) [1932] A. C. 562.
(2) [1905] 1 K. B. 253.
(3) [1932] A. C. 592.
(4) 10 M. & W. 109.
(5) [1932] A. C. 615.

to arise solely out of contract, and in *Donoghue* v. *Stevenson* (1) the whole case for the respondent was that, as there was no contractual relation between pursuer and defender, the latter owed no duty to the former. The respondent sought to limit the exceptions to that rule to cases of things dangerous in themselves and to cases where there was an element of fraud. It is surely because the House rejected that argument and enlarged the conception of duty that the decision is now regarded as a leading case in our law. Branson J., in *Stennett* v. *Hancock* (2), and Atkinson J. in *Buckner* v. *Ashby and Horner* (3), both took the view of *Earl* v. *Lubbock* (4) which I have endeavoured to express, and I agree with Atkinson J. that, if properly pleaded, that case would to-day be differently decided. It follows that, where the facts show that no intermediate inspection is practicable or is contemplated, a repairer of a chattel stands in no different position from that of a manufacturer, and does owe a duty to a person who, in the ordinary course, may be expected to make use of the thing repaired.

It is, however, argued that it is not right that a repairer who, as in the present case, has stipulated with the person who employs him that he shall not be liable for accidents, should none the less be made liable to a third person. The answer to this argument is that the duty to the third party does not arise out of the contract, but independently of it. It is, for instance, a common thing nowadays for a garage proprietor to stipulate that customers' cars are driven by him only at the sole risk of the customer. But if, while driving a customer's car, he runs into and injures a pedestrian, the contract he has made would afford no answer to the latter's claim. To hold the repairer liable in the circumstances of the present case, in no way enlarges the liability of a contractor or repairer who, being employed to do certain work, does it properly and hands it over to the person who employed him. If a danger be thereby created, it is for the employer to guard against it. For instance, an owner of property engages a

(1) [1932] A. C. 562.
(2) [1939] 2 All E. R. 578.
(3) [1941] 1 K. B. 321.
(4) [1905] 1 K. B. 253.

contractor to erect an obstruction across a drive or private road where none has before existed. He does what he is employed to do exactly in the way his employer desires. Next day a tradesman approaching the house in the dark runs into the unexpected obstruction and is injured. He would have no claim against the contractor, because it is the employer who created the danger and the duty of guarding or warning against it lies on him. To render the contractor or repairer liable, there must be, first, a want of care on his part in the performance of the work which he was employed to do, and, secondly, circumstances which show that the employer will be left in ignorance of the danger which the lack of care has created. Suppose a lift repairer told the owner that a part was worn out so that while he could patch it up he could not leave it in a safe condition. If he were told to do the best he could, and an accident then happened, I cannot conceive that the repairer would be held liable. He has fulfilled his duty by warning the employer, and if the latter, in spite of that, chooses to allow the lift to be used, the liability will rest on him. The accident would be caused, not by the carelessness of the repairer, but by the employer's disregard of the warning given to him. In the present case, the landlord is not liable to the plaintiff because he had a right to rely on the work and reports of the experts he employed, and no examination of their work after completion was contemplated. It would, I venture to think, be a strange and unjust result if the plaintiff who has been injured directly by the careless performance of the work is to be left without a remedy.

In my opinion, the appeal of the engineers should be dismissed.

Landlord's appeal allowed.
Engineers' appeal dismissed.

Solicitors for plaintiff: *Simmons & Simmons.*

Solicitors for defendant, Daw: *Kenneth Brown, Baker, Baker & Co.*

Solicitors for defendants, A. & P. Steven, Ld.: *Carpenters.*

R. F. S.

REX *v.* BARKER.

1941
July 7, 8.

Criminal law — Evidence — Confession — Production of business books and documents—Promise, inducement or threat—Admissibility of books and documents.

Where a promise, inducement or threat is held out or made to an accused person by or on behalf of the prosecutor, and as a result business books and documents are produced by the accused person, those books and documents stand on the same footing as an oral or written confession which is brought into existence by a promise, inducement or threat, and are inadmissible in evidence against the accused person at his trial.

Appeal against conviction.

The appellant, William Charles Barker, was convicted before Lewis J. at the Central Criminal Court on May 1, 1941, on an indictment charging him, together with one Robinson, of having conspired to cheat and defraud His Majesty the King and the Commissioners of Inland Revenue of sums due from Robinson for income tax and sur-tax, and with having delivered false statements of account with intent to defraud.

In April, 1937, the commissioners made an order on Robinson for the production of books and documents. The appellant, who was an accountant, was employed by Robinson in making returns for inland revenue purposes. At an interview with the appellant and Robinson on December 31, 1937, a document was read to them by the inspector representing the commissioners, which contained the following extract from a Ministerial statement published in Hansard's Parliamentary Debates of July 19, 1923: "The question of fraud and evasion in connection with direct taxation is, of course, a matter of great "importance to the Exchequer, but it is not desired that "fraudulent taxpayers should be deterred by the fear of "criminal proceedings from making spontaneous disclosure of "their misdeeds and appropriate pecuniary restitution. The "following statement explains the practice followed by the "Board of Inland Revenue in the matter." This statement concluded as follows: "Where the taxpayer takes the initiative "and voluntarily discloses the fact of his past frauds and their "full extent and is also prepared to facilitate investigation "and to furnish full evidence (including not only the business "books and records, but also private bank books), as may be "required on behalf of the board as to the amount of the "correct liability, the board will not institute criminal proceedings, but will accept a pecuniary settlement. Cases not "infrequently arise in which the disclosure, though in a sense "voluntary, is not made on the initiative of the taxpayer. "For example, the taxpayer may have been requested to "furnish accounts, or further particulars in connection with "accounts already rendered, or the production of books may "have been suggested. If in such a case the taxpayer forthwith comes forward with a full and frank disclosure of past "frauds, this would be accepted by the board as equivalent "to a voluntary disclosure to the extent that the board would "not institute criminal proceedings, but would accept a "pecuniary settlement." After this document was read to them, the appellant and Robinson produced to the inspector two ledgers (A and B), which had been fraudulently prepared, to induce the inland revenue authorities to believe that the irregularities amounted to 7000*l.* in all. At a later interview on February 22, 1938, two further ledgers were produced, together with the appellant's working papers, which showed that the ledgers A and B were incomplete and had been brought into existence to deceive the revenue. A further interview was held in March and as a result, on April 2, a letter was written which made it clear that the full amount of the irregularities was about 10,400*l.* Robinson and the appellant were subsequently charged at the Central Criminal Court with the offences mentioned. The appellant conducted his own defence and raised the objection that the documents produced after the interview of December 31, 1937, were inadmissible in that their production had resulted from a promise or threat held out to him by the authorities. The books and documents were, nevertheless, admitted in evidence by the learned judge and the appellant was convicted and sentenced to imprisonment for twelve months. Robinson, who was defended by counsel, was also convicted and sentenced to imprisonment for six months.

The appellant appealed.

Astell Burt (*C. L. Hauser* with him) for the appellant. The extract from Hansard was partly a promise or an inducement, and partly a threat. Nothing said, written or done by the appellant as a result thereof should be admitted in evidence. Here the appellant produced the books or documents as a result of the promise, inducement or threat. Prima facie his action was not free and voluntary. The onus of showing that it is so lies on the prosecution: *Reg.* v. *Thompson* (1). Here they have failed to discharge it, and the ledgers and documents should not have been admitted: *Rex* v. *Cason* (2). The conviction cannot stand.

L. A. Byrne for the Crown. Although a confession is induced by a promise or threat and therefore is not evidence, the facts discovered in consequence can be proved against the person making it. Thus, where stolen goods are found as a result of a confession, the circumstances of the discovery itself can be proved although the confession itself is inadmissible: Archbold on Criminal Pleading, Evidence and Practice, 30th ed., p. 402. On this ground the ledgers and working papers produced by the appellant were admissible against him. Moreover those books and documents were in existence before the promise, inducement or threat was given or made, and inasmuch as they did not arise therefrom they were not inadmissible.

Burt in reply. Where property is found as a result of an inadmissible confession, evidence of the discovery can be given; but that is not so where the discovery is made in the course of the confession: *Reg.* v. *Francis Jones* (3).

The Court (Viscount Caldecote C.J., Tucker and Asquith JJ.) allowed the appeal.

(1) [1893] 2 Q. B. 12.
(2) (1935) 14 Annot. Tax Cas. 471.
(3) (1809) R. and R. 152.

1941

Rex
v.
Barker.

The judgment of the court was delivered by TUCKER J., who set out the facts and continued: This case raises questions of difficulty and importance. Mr. Burt has referred the court to *Rex* v. *Cason* (1), in which Judge Dodson, when sitting at the Central Criminal Court as commissioner, ruled that a document which had been brought into existence as the result of the reading to the defendant of this extract from Hansard was not admissible in evidence on the ground that it was a confession or a statement which had been made as the result of an inducement. In the present case Mr. Byrne, on behalf of the Crown, says that the ledgers and working papers produced by Robinson and the appellant should be distinguished from the document which Judge Dodson decided was not admissible because they were not brought into existence as the result of a promise or a threat, if there be a promise or threat contained in this extract from Hansard, but at all times had been in existence and were part and parcel of the method whereby the fraud had been committed. He contended that they could be given in evidence although they were produced by the appellant and Robinson as the result of having the extract from Hansard read to them. He cited a passage setting out what he submitted was the law on this matter as summarized in Archbold's Criminal Pleading, Evidence and Practice, 30th ed., p. 402: "Although a confession for the above or any other reasons "may not be receivable in evidence, yet any discovery that "takes place in consequence of such confession, or any act "done by the defendant, if it is confirmed by the finding of "the property, will be admitted." The court accepts that statement of the law and does not desire to question that there may be cases in which evidence can be given of facts the existence of which have come to the knowledge of the police as the result of an inadmissible confession. But in the present case the promise or inducement which was implied in this extract from Hansard expressly related to the production of business books and records, and the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the person or persons to whom the promise or inducement is held out, or the threat made, those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat.

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(1) 14 Annot. Tax Cas. 471.

The result is that, in the opinion of the court, these vital documents and books, namely, the ledgers and the working papers of the appellant, were wrongly admitted in evidence and in those circumstances the conviction of the appellant cannot stand. The court has not lost sight of the fact that the extract from Hansard in terms refers to tax-payers and not to an accountant, but, having regard to all the circumstances of this case and what took place on December 31, 1937, the court has no doubt that the promise contained in the document was intended to apply and was held out to the appellant just as much as to Robinson.

Appeal allowed.

Solicitors for appellant: *J. H. Milner & Son.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

F. P. F.

1941
July 10, 14.

CHARENTE STEAMSHIP COMPANY, LIMITED *v.* WILMOT (INSPECTOR OF TAXES).

Revenue—Income tax—Profits or gains—Deductions—Replacement of obsolete machinery—Ships—Replacement of several in one year—Computation of amount of deduction—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules Applicable to Cases I. & II., r.* 7.

By r. 7 of the rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, it is provided that: "In estimating "the profits or gains of any trade, manufacture, adventure, or "concern in the nature of trade chargeable under this Schedule "there shall be allowed to be deducted as expenses incurred in "any year so much of any amount expended in that year in "replacing any plant or machinery which has become obsolete "as is equivalent to the cost of the plant or machinery replaced "after deducting from that cost the total amount of any allowances "which have at any time been made in estimating profits or gains "as aforesaid on account of the wear and tear of that plant and "machinery, and any sum realised by the sale of that machinery "or plant."

Three steamships belonging to a company became obsolete and were for the purposes of this case assumed to have been replaced during the year of assessment. In the case of one ship the total amount of allowance for wear and tear together with the sale price of the ship was less than the original cost of the ship, but in the case of the other two ships the total amount of the allowances for wear and tear together with the sale prices exceeded their original cost. It was contended on behalf of the Crown that the company could not claim allowances under r. 7 in respect of the deficiency on the one ship without setting off against that deficiency the surpluses in respect of the other two ships:—

Held, that the contention of the Crown was not well founded, as r. 7 dealt only with a case where there was a deficiency on the replacement of obsolete plant or machinery, that was, of a capital asset, and it did not purport to deal with a case where the replacement of a capital asset resulted in a surplus.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the commissioners held on January 16, 1940, the appellants, the Charente Steamship Co., Ld., appealed against an assessment to income tax made on them for the year 1936–37. The ground of the appeal was that, in the computation of the liability, a deduction had not been allowed under r. 7 of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, in respect of the replacement of certain obsolete plant, namely, the steamship *Patrician*, the cost of which was greater than the total allowances made on account of the wear and tear of that steamship and the sum realized by her sale.

The appellants were the owners of about fifty steamships. From time to time ships which were deemed to have become unsuitable for the appellants' business were sold and replaced by others. During the appellants' trading year to December 31, 1935, which was the basis year for the assessment under appeal, the appellants decided to dispose of the following ships: *Delilian*, *Dorelian*, *Specialist*, *Patrician*, *Musician*, and *Senator*, and to replace them by other vessels which were bought in the same year. The *Delilian*, *Dorelian* and *Specialist* were sold in 1936, and the *Patrician*, *Musician* and *Senator* in 1938, the ships having been retained in the service of the appellants until a suitable opportunity for sale arose. No question arose with regard to the *Delilian*, *Dorelian* and *Specialist*. In the case of the *Patrician* the total amount of allowances for wear and tear together with the sale price of the ship was less than the original cost of the ship. In each of the cases of the *Musician* and the *Senator* the total amount of the allowances for wear and tear together with the sale price of the ship exceeded the cost. The appellants claimed allowance under r. 7 in respect of the *Patrician*, but the Inspector of Taxes contended that the amount of the "surpluses" in the cases of the *Musician* and the *Senator* should be set off against the "deficiency" in the case of the *Patrician*.

The commissioners found as a fact that the *Patrician* had been replaced within the meaning of r. 7 within the period to which the assessment related. They were of opinion, however, that, to determine the allowance to be made under r. 7, the appellant could not be allowed to select merely those items in respect of which a loss could be shown, but that regard must be had to the net result of the whole replacements during the year, and, therefore, dismissed the appeal.

The appellants appealed.

On the hearing of the appeal it was stated by the Solicitor-General, on behalf of the Crown, that it was desired to obtain a decision on the question whether, in determining the allowance to be made under r. 7, the plant or machinery must be taken as a whole, or whether the subject could be allowed to select those items in respect of which a loss on replacement could be shown, and, therefore, the Crown were prepared to waive the question whether the *Patrician* had been replaced within the meaning of the rule in 1935 although she was not sold until 1938. The commissioners had found that she had been so replaced, but they had not set out the facts on which their decision was based. The Crown reserved the right to raise this question again in a suitable case.

J. Millard Tucker K.C. and *H. I. Nelson* for the appellants. In considering the allowance to which the appellants are entitled under r. 7 of the Rules applicable to Cases I. and II. of Sch. D, Income Tax Act, 1918, each ship must be considered separately. The total allowance made in respect of the wear and tear of the three ships, together with the total sum realized on their sale, must not, as the Crown contends, be deducted from the total original cost of the three ships.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. The decision of the commissioners was correct. In considering the allowances to which the owners of plant and machinery are entitled in respect of replacement, the practice of the Inland Revenue has always been to regard the assets of the business as a whole. The words "any plant or machinery "which has become obsolete" in r. 7 must refer to plant and machinery of the business as a whole, and include all the three ships belonging to the appellants which became obsolete and were replaced in the year in question and the words "that machinery or plant" at the end of the rule must mean the same thing.

Tucker K.C. in reply. The word "expenses" in the rule shows that it was contemplated that as each piece of plant or machinery became obsolete and was replaced, the expense of doing so should be allowed under the rule.

Cur. adv. vult.

July 14. MACNAGHTEN J. read a judgment in which he stated the facts, read r. 7 of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, and continued: A ship admittedly comes within the meaning of the words "plant or machinery" as used in r. 7 and the application of the rule in the case of the replacement of an obsolete ship seems plain enough. If the amount of the sums allowed in previous years for depreciation together with the price obtained on her sale is less than the price which the shipowner originally paid for her, the deficiency is to be included in the trading account as an expense. The question at issue is whether, on the true construction of r. 7, the Crown is entitled to set off the "surpluses" in the cases of the *Musician* and the *Senator* against the "deficiency" in the case of the *Patrician*, and thus diminish the "deficiency," or, it may be, extinguish it. The Special Commissioners have decided the question in favour of the Crown. The appellants contend that their decision is wrong.

It is said that this is a case of first impression; that the question has never before come up for decision. It is to be observed that, if a shipowner is so fortunate as to be able to sell his ship for more than she cost him, income tax is not chargeable on the excess because, as has been said, income tax is a tax on income. It is not a tax on capital or on the appreciation of a capital asset such as a ship or any other "plant or machinery." It would, I think, be somewhat whimsical so to construe r. 7, which on the face of it purports to give relief from taxation, that in effect it would impose taxation on a subject-matter which, but for the rule, would be exempt from taxation.

But the short answer to the contention put forward by the Crown is that on the face of it the rule deals only with the case when there is a "deficiency" on the replacement of obsolete "plant or machinery," that is, the replacement of a capital asset, and it presupposes that allowances for depreciation of the asset have been made in previous years and that the result of the replacement is a "deficiency." The rule does not purport to deal with the replacement of a capital asset which has resulted in a "surplus," and I can see no reason for implying what is not expressed. In my opinion, therefore, the contention raised by the Crown is not well founded, and this appeal should be allowed.

I ought to add that before the Special Commissioners the question was raised whether the *Patrician* had been replaced within the meaning of the rule in 1935, since she was not sold till 1938. The commissioners decided that question in favour of the appellants, but they omitted to set out in the case the facts on which their decision was based, and it would have been necessary, if the Crown had not waived the question, to remit the case to the commissioners to be restated. Since it was desired to obtain the decision of the court on the question whether "surpluses" ought to be set off against "deficiencies," the Solicitor-General thought fit to waive this other question without prejudice to the right of the Crown to raise it again in any suitable case. I should further add that the case does not state expressly that the *Patrician* became obsolete in 1935; but the argument before me proceeded on the assumption that she did in fact become obsolete within the meaning of r. 7 in that year.

Appeal allowed.

Solicitors for appellants: *Simpson, North, Harley & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

B. S. LYLE, LIMITED *v.* PEARSON AND ANOTHER.

C. A.
1941
July 23.

Money-lender—Reopening loan transaction—Series of loans to same borrower—Excessive interest in earlier transactions—Final transaction at low rate of interest—Right of court to reopen earlier transactions—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-ss.* 1, 2.

The plaintiffs, who were money-lenders, made two advances to P. on joint and several promissory notes of P. and M., who was a surety for P., the rate of interest in both transactions being 150 per cent. for one month. Finally, they took from P. and M. a promissory note for the amount outstanding bearing interest at 25 per cent. In an action on this note by the lenders against the debtor and surety, the surety, who alone defended, sought to reopen the whole series of transactions to show that, although the final transaction appeared fair and reasonable on the face of it, it was not so in fact, being only a stage in a series of transactions which were harsh and unconscionable as a whole:—

Held, that the court was entitled to reopen the earlier transactions, and as the money-lenders had given no evidence to justify interest exceeding 48 per cent. per annum, was bound by s. 10, sub-s. 1, of the Money-lenders Act, 1927, to presume those transactions to be harsh and unconscionable.

Held, also that, in default of agreement between the parties as to the figures, an account must be taken of the amounts advanced, with interest at 48 per cent. down to the date of the final promissory note, and thereafter at 25 per cent., but with rests at the dates of any repayment by the debtors. In the absence of allocation by the debtors, a repayment must be taken as made on account of interest at the rates awarded by the court.

Judgment of Cassels J. reversed.

B. S. Lyle, Ld. v. *Chappell* [1932] 1 K. B. 691 and *B. S. Lyle, Ld.* v. *Castle* (1935) 158 L. T. 242 (in note to *In re British Games, Ld.*) discussed.

APPEAL from Cassels J.

On March 24, 1939, the plaintiffs, B. S. Lyle, Ld., registered money-lenders, advanced to the first defendant, Captain Pearson, 100*l.* on a joint and several promissory note signed by him and the second defendant, Mrs. Medlycott, the rate of interest being 150 per cent. for one month. Mrs. Medlycott, to the plaintiffs' knowledge, was merely a surety for Captain Pearson, who was impecunious. On June 13, 1939, Captain Pearson borrowed a further 200*l.* on a similar note signed by himself and Mrs. Medlycott at the same rate of interest. At some time 75*l.* was repaid, but on January 1, 1940, 490*l.* was still owing to the plaintiffs. The defendants then gave a new promissory note for 490*l.* with interest at 25 per cent. per annum, and on June 21, 1940, the plaintiffs sued on this note claiming, at that date, 536*l.* 17*s.* 0*d.* Captain Pearson was not served, and the action proceeded against Mrs. Medlycott alone. She alleged (inter alia) that the three transactions were harsh and unconscionable, and she counterclaimed under s. 1, sub-s. 2, of the Money-lenders Act, 1900 (1), to have the two earlier transactions reopened, and an account taken. Cassels J. held that he was bound by *B. S. Lyle, Ld.* v. *Chappell* (2) and *B. S. Lyle, Ld.* v. *Castle* (3) to hold that, as the transaction sued on was on the face of it reasonable he could not reopen the earlier transactions, and he gave

(1) Money-lenders Act, 1900, s. 1, sub-s. 1: "Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; . . . ."

Sub-s. 2: "Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent . . . ."

(2) [1932] 1 K. B. 691.

(3) (1935) 158 L. T. 242 in a note to *In re British Games, Ld.*, 158 L. T. 240.

judgment for the plaintiffs for 600*l.* (the excess over the amount claimed on the writ being taken by consent as the interest from date of writ to judgment) and costs. Mrs. Medlycott appealed.

Quass for the appellant. Cassels J. misunderstood the effect of *B. S. Lyle, Ld.* v. *Castle* (1) and *B. S. Lyle, Ld.* v. *Chappell* (2), which afford no authority for the proposition that, if the transaction sued on is on the face of it reasonable, earlier transactions cannot be reopened to ascertain whether it is so in fact. [He referred to *Mills Conduit Investment, Ld.* v. *Leslie* (3).] The borrower can at any time under s. 1, sub-s. 2, of the Money-lenders Act, 1900, initiate proceedings to reopen transactions, and the appellant's counterclaim is the equivalent of a new action. In *B. S. Lyle, Ld.* v. *Bellville* (4) Asquith J. took a different view from Cassels J.

Le Quesne K.C. and *Diamond* for the respondents. *B. S. Lyle, Ld.* v. *Castle* (1) is authority for the proposition that the new transaction is to be treated as a transaction with a new money-lender, and therefore, if it is fair and reasonable on the face of it, and no evidence is given by the borrower to prove that it is not, it cannot be reopened, nor can the earlier transactions.

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(1) 158 L. T. 242.

(2) [1932] 1 K. B. 691.

(3) [1932] 1 K. B. 233.

(4) Unrep. July 21, 1941. In this case also the question arose of the reopening of earlier transactions where the final transaction appeared on its face to be reasonable. Asquith J., in holding that the earlier transactions could be reopened, said that *B. S. Lyle, Ld.* v. *Chappell* ([1932] 1 K. B. 691) established that the final transaction was a new loan, but that fact did not preclude the court from reopening previous transactions. He could derive no clear instructions from *B. S. Lyle, Ld.* v. *Castle* (158 L. T. 242) which was inadequately reported. He preferred to rely on another decision of the Court of Appeal which seemed to him to be wholly unambiguous, namely, *Saunders* v. *Newbold* ([1905] 1 Ch. 260). From that case two propositions emerged clearly: (1.) when the money-lender sued, s. 1, sub-s. 1, of the Money-lenders Act, 1900, applied, and the defendant could raise in his defence the issue whether transactions antecedent to the last one, which was sued on, were harsh and the rate of interest excessive, but he could only do that if the antecedent transactions were connected with the final transaction and were relevant to its reasonableness; (2.) the defendant was entitled under s. 1, sub-s. 2, of the Act, by action brought by himself or by counterclaim in the money-lender's action, to raise the question whether the antecedent transactions were harsh and the rate of interest excessive, and he could do that whether or not those transactions were connected with the final transaction or were relevant to its reasonableness.

GODDARD L.J. delivered the judgment of the court in which he stated the facts set out above and continued: The reason why the money-lenders entered into the last transaction, in which the interest was at the seemingly most moderate rate of 25 per cent., was because they thought that they had found a loophole in the Money-lenders Acts, by reason of the decision of this court in *B. S. Lyle, Ld.* v. *Castle* (1). If the plaintiffs and others of their fraternity imagine that that case affords the loophole which they seem to think they have found, the sooner they disabuse their minds of the idea the better.

Cassels J. took the view, on the authority of that case and of *B. S. Lyle, Ld.* v. *Chappell* (2), that he could only look at the last transaction. Finding it to be a loan of 490*l*. with interest at 25 per cent. per annum, he came to the conclusion that there was nothing to show that the transaction was harsh or unconscionable, and, as the rate of interest charged was under 48 per cent., if nothing else could be looked at, under s. 10, sub-s. 1, of the Money-lenders Act, 1927, it was for the defendants to have attacked it and not for the plaintiffs to have supported it. In the opinion of this court this shows an entire misapprehension of the position under the Money-lenders Acts. *B. S. Lyle, Ld.* v. *Chappell* (2) is a clear authority in favour of the appellant and shows plainly that in a series of transactions of this sort the court can order the reopening of all the transactions which have led up to the last transaction. Indeed, it is manifest that they can do so under s. 1, sub-s. 2, of the Money-lenders Act, 1900.

It is, however, said that the law has been altered by *B. S. Lyle, Ld.* v. *Castle* (1), a case which, if it does decide what the money-lenders appear to have thought that it decides,

(1) 158 L. T. 242.

(2) [1932] 1 K. B. 691.

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would, as Mr. Le Quesne admits, lead to a somewhat startling result. The facts are not set out, but there is a shorthand note of the judgment, and when that is carefully considered, it appears, I think, that the case does not decide anything approaching what Cassels J. seemed to think that it decided. Greer L.J. said (1): "It would seem that Scrutton L.J. had "come to the conclusion"—that is, in *B. S. Lyle, Ld.* v. *Chappell* (2)—"that the matter could be reopened and treated "as one transaction. In my opinion, however, the judgment "of the other members of the court is not to the same effect "and I desire to keep open for future decision any question "as to what the real decision in that case was. Having "heard the judgment of the trial judge read, I have come to "the conclusion that he considered the transactions from "beginning to end, and that, on the assumption, which for the "present purpose I assume to be right, that he was entitled "to do so, he then came to the conclusion on that basis that "there was on the particular facts of the case nothing harsh "and unconscionable in what had been charged on the loans "originally." The Lord Justice then went on to consider the question of compound interest, and he held, I think, that for the purpose of considering whether compound interest was charged (which offends against the Money-lenders Acts and brings certain consequences in its train) the last transaction had to be regarded as though it were a separate transaction and that, therefore, it could not be said that compound interest had been charged. In *B. S. Lyle, Ld.* v. *Chappell* (2) the decision turned entirely on the question whether a memorandum was in proper form and valid. The court held that the memorandum, which recited the loan of 300*l.* to the defendant and contained a request by him that 200*l.* of the sum lent should be allocated by the money-lenders to the repayment of a previous loan which was still outstanding, was a good memorandum although the 200*l.* had never actually been handed by the money-lenders to the defendant. The matter had to be dealt with as if the 200*l.* had been paid to the defendant and handed back by him to the money-lenders

(1) 158 L. T. 242.

(2) [1932] 1 K. B. 691.

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to cancel the old loan. Greer L.J., in his judgment in *B. S. Lyle, Ld.* v. *Castle* (1), went on to say: "It may be"—observe that he said "it may be"—"that, in order to determine "the question whether there is some compound interest, it is "necessary to determine whether the last transaction must "be considered by itself. In my judgment, s. 1 of the Money-"lenders Act, 1900, means that, before the judge is entitled "to reopen the transaction, he must come to the conclusion "that the loan liability from which the borrower desires to be "free contains something which is harsh and unconscionable, "and that then, being so satisfied, he may reopen the trans-"action from beginning to end and reduce the interest or "take an account between the parties which he considers is fair "and right. But in my judgment *B. S. Lyle, Ld.* v. *Chappell* (2) "decides conclusively that, if the transaction means that "the money is lent to the borrower and that the borrower "with that money pays off the old loan, the court is no longer "in a position to treat the transaction as a mere renewal, "notwithstanding the observations of Scrutton L.J." But in that case the Lord Justice was not considering, and the court was not considering, a counterclaim by the defendant to have all the transactions reopened. They were simply considering whether on the one transaction it could be said that there was compound interest, and there was no point in the court considering whether, on the defendant's counterclaim, the old transactions could be looked into under sub-s. 2 (not under sub-s. 1) of s. 1 of the Money-lenders Act, 1900, because the trial judge had found that there was nothing harsh and unconscionable in those earlier transactions. Therefore, there was nothing to go into on the counterclaim. With all respect to Cassels J., that case is no authority for the proposition that the Money-lenders Acts can be evaded by this patent and almost shameless device, by which the money-lender, having lent money at a harsh and unconscionable rate of interest, seeks to escape any difficulty into which that may put him by embodying all the previous loans and interest in a new promissory note at some low rate of interest and

(1) 158 L. T. 242.

(2) [1932] 1 K. B. 691.

then suing the defendant on that as soon as he has made default. The result is that this appeal succeeds.

Another question which arises is whether we should enter judgment or order a new trial. Under the Money-lenders Act, 1927, s. 10, as 150 per cent. was admittedly charged on the first loan, it must be for the money-lender to justify it, and no one can say whether the interest on the last loan was justifiable at 25 per cent. until he knows what the true transactions were. I say nothing about whether or not it is possible to justify interest at 150 per cent. on a loan which is guaranteed by a surety—it may be—but it is for the plaintiffs to prove that that rate, being over 48 per cent. is reasonable. They gave no evidence on the subject, and Cassels J. never applied his mind to it because he thought that *B. S. Lyle, Ld.* v. *Castle* (1) forbad him to go into the matter. The matter therefore stands in this way. The Money-lenders Act, 1927, provides that, if the moneylender is to recover more than 48 per cent. interest, he has to justify the higher rate of interest. Mr. Quass, for the appellant, says that he will agree to 48 per cent. and with that the money-lender will have to be content.

The result is that the appeal will be allowed, with costs: the appellant will have the costs of the appeal and of the counterclaim. In accordance with what Scrutton L.J. said in *B. S. Lyle, Ld.* v. *Chappell* (2), as the respondents did not attempt to support the rate at which they had charged interest, it is to be regarded as harsh and unconscionable and it is not right that they should have any costs. The present judgment for the respondents will be set aside and judgment will be entered for them for a sum to be agreed by the parties. If they cannot agree, an account will be ordered. The figures are to be agreed on this basis. 100*l*. was advanced on March 24, 1939, and is to carry interest at the rate of 48 per cent. until January 1, 1940, and the sum of 200*l*. is to carry interest from June 13, 1939, to January 1, 1940, but they are to be taken with rests at the date of any repayment. Interest is to be calculated at those rates subject to credit being given for the payments which have been made and the interest

(1) 158 L. T. 242. (2) [1932] 1 K. B. 691.

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to be calculated as from those dates. As from January 1, 1940, to the date of the trial the interest will be at 25 per cent.

[After further discussion whether the defendant's payments must be allocated to capital or income.]

Scott L.J. I think the payments, if they were not allocated to capital, must be treated as having been payments made on account of interest, but on account of the interest really due pursuant to the order of the court.

Appeal allowed.

Solicitors for the appellants: *Arthur Dollond & Co.*
Solicitors for the respondents: *M. A. Jacobs & Sons.*

J. W. H.

LOTINGA *v.* NORTH EASTERN MARINE ENGINEERING COMPANY (1938), LIMITED.

1941
July 23.

Factory Acts—Lifting Machinery—Crane—Overhead travelling crane—Effective measures to ensure crane does not approach within twenty feet of workmen on or near wheel-track—Absolute obligation of employer—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 24, *sub-s.* 7.

Sub-sect. 7 of s. 24 of the Factories Act, 1937, imposes an absolute duty on an employer, "if any person is employed or "working on or near the wheel-track of an overhead travelling "crane in any place where he would be liable to be struck by the "crane," to take "effective measures . . . . to ensure that the "crane does not approach within twenty feet of that place," and the employer does not fulfil that duty by merely exhibiting a general notice to his workpeople requiring them to take steps for their own protection.

CASE stated by justices.

At a court of summary jurisdiction sitting at Wallsend on August 6, 1940, an information was preferred by the appellant, Alfred Giller Lotinga, an inspector of factories, against the respondents, North Eastern Marine Engineering Co. (1938), Ld., occupiers of a factory at Wallsend, alleging that on June 15, 1940, they contravened s. 24, sub-s. 7, of the Factories Act, 1937 (1).

The following facts were proved or admitted: On June 15, 1940, Ernest Dawson, a labourer, John James Thompson, a labourer, and one Gallagher, an electrician, were employed in the erecting shop of the respondents. They were engaged in hoisting a switch on to a gantry and thence to a position on a steel column where it was to be fixed. On reaching the floor of the gantry they were in danger of injury from the movements of an overhead crane. Such work was regularly

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(1) The Factories Act, 1937, s. 24, sub-s. 7, provides: "If any "person is employed or working "on or near the wheel-track of an "overhead travelling crane in any "place where he would be liable "to be struck by the crane, "effective measures shall be taken "by warning the driver of the "crane or otherwise to ensure "that the crane does not approach "within twenty feet of that "place."

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carried out in the shop, and the men engaged had done similar work before and were aware of the danger. Notices were posted and maintained by the respondents in the vicinity of danger zones, warning persons who had to work in those positions that they must warn the crane drivers concerned, the crane drivers being not always able to look out for workmen in such positions. The crane driver concerned in the accident hereinafter referred to had had thirty-seven years' experience of driving in the respondents' shop. All the workmen of the respondents who were called before the justices knew well of the danger involved, and of their duty to warn the crane driver. It appeared from the evidence that the practice of warning the driver had been in operation for many years and was generally observed. On the day in question the overhead crane came along without any warning having been given by anyone to the driver, and Ernest Dawson was killed. Dawson and Thompson had apparently had in mind the necessity of warning the crane driver and had discussed the point, but had decided that, as the crane was 40 to 50 feet away, they would have time to get into a position of safety on the column from which they would warn the crane driver of their presence.

The justices dismissed the information and stated the following grounds for their decision: "We were of opinion "that it was our duty to consider the evidence; that the test "of the effectiveness of the measures taken by the respondents "was their success or failure over a substantial period; that "it was unreasonable to condemn as ineffective the measures "taken by the respondents which had been in constant practical "operation for a known period of 37 years, with only the "present failure, which arose from the act of the workman, "who . . . . through wrong judgment, chose to defer the taking "of action; and that on the evidence before us it had not "been proved that the respondents had failed in their duty "to take the effective measures required by the statute."

The inspector of factories appealed.

H. L. Parker for the appellant. The posting of warning notices by the respondents near danger zones was not an

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"effective" measure within s. 24, sub-s. 7, of the Factories Act, 1937. Admittedly no warning was given to the driver and no effective measures "otherwise" were taken by the respondents to ensure that the crane should not approach within twenty feet of the workmen, but it was the duty of the respondents to take such effective measures. One of the main objects of the Act is to protect workmen against themselves, and the only measures taken by the respondents put on the workmen the obligation to warn drivers.

Harvey Robson for the respondents. The only contention of the prosecution before the justices was that the measures taken by the respondents could not have been effective measures because they had not prevented the accident. That principle might apply to prosecutions under the statutory provisions and regulations relating to the fencing of fixed machinery, which are mandatory, so that a breach of them constitutes an offence. Sub-sect. 7 does not impose an absolute duty on the employer. Had it been intended to do so, it would have been in such words as "a travelling crane shall not "approach within twenty feet, etc." When dealing with moving machinery, such as a travelling crane, an employer must necessarily rely on a number of persons obeying instructions given to them, or complying with a system of precautions which has been adopted. The word "effective" in sub-s. 7 means "efficient or proper" measures to prevent a particular result. If that be the test, then it becomes a question of fact whether any specific measures are effective, and there was evidence to support the finding of the justices. The respondents were entitled to rely on measures which, judged by experience over more than thirty years, had proved to be "effective."

VISCOUNT CALDECOTE C.J. [after stating the facts :] It is not superfluous to remember that the Factories Act, 1937, which is the latest of many Acts dealing with the safety of workpeople, is more stringent in its terms than any preceding legislation. This particular sub-section appears in a Part of the Act which deals with safety. Some of the sections in that Part, like s. 14, deal with peculiarly dangerous machines, and make special provisions with regard to them. As Lord Hewart C.J. said in *Sutherland* v. *James Mills, Ld.* (*Executors*) (1): "A large part of the purpose of these statutes "was to save workmen from themselves. That is to say, not to "save them from deliberate acts of mischief, but to save "them from consequences which they may incur if, in haste, "hurry, carelessness, or, it may be, indolence, they do some-"thing in a way in which they ought not to do it."

In the present case it is said that the obligation which rests on the employers had been discharged, because they put up notices forbidding cranes to approach within twenty feet of men working on this gantry and enjoining workmen to notify crane drivers of their presence on this gantry before starting work. The justices found, after having heard evidence that the present system had been in force in the respondents' works for thirty-seven years without an accident ever having taken place, that it was unreasonable to condemn as ineffective the measures taken by the respondents. They say that the failure of the system to safeguard the workman in the present case "arose from the act of the workman, who, "not by reason of ignorance, neglect or carelessness, but well "aware of the danger, and of his duty to take the action "designed to avert it, through wrong judgment, chose to defer "the taking of action" until what he thought would be a more suitable time. The plain meaning of that finding of the justices is that it was the duty of the workman to take action to avert an accident; that he exercised a wrong judgment in failing to discharge that duty, with the result that the accident took place; and that, in consequence, the respondents had not failed in their duty. The duty under the Act, however, is put on the employer, and not on the workman. The words are strong words. The sub-section requires that "effective "measures shall be taken . . . . to ensure that the crane does "not approach within twenty feet of that place." So far as the evidence in this case discloses the facts, no measures at all were taken, either by warning or otherwise, to prevent the crane approaching within twenty feet of where the workpeople were working, but what was done was that a general notice was exhibited, in terms which did not correspond very closely with the terms of the sub-section, to workpeople to take steps for their own protection.

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(1) (1938) 36 L. G. R. 167, 170.

In my judgment, the justices arrived at a wrong decision. They were apparently captivated by the idea that because an accident had not taken place for a number of years, the procedure which had been followed during those years must be effective. I think that that is a wrong conclusion. Effective measures were not taken in this case to ensure that the crane did not come within twenty feet of where these workmen were working. To find otherwise would be to water down the provisions of this sub-section which, in words as plain and as strong as the draftsman could use, place an absolute obligation on the employer. This court has always been slow to accept an argument having that result. The argument presented to us to-day bears some similarity to that which was addressed to the court in *Sutherland* v. *James Mills, Ld.* (*Executors*) (1), where it was contended that the user of a particular machine without accident for a very long period was proof that the machine was not a dangerous machine.

In my judgment, the justices arrived at a wrong decision because they directed their minds to the wrong point. The point which they should have considered was whether or not effective steps were taken on the occasion in question, and as there was no evidence of any effective steps having been taken, the offence was proved.

TUCKER J. I agree. In my opinion this is a very clear case. It will be observed that two of the words in s. 24, sub-s. 7, of the Act of 1937, are "effective" and "ensure." In my view, this sub-section imposes an absolute obligation on employers to ensure that, in the circumstances stated in the sub-section, the crane shall not approach within twenty feet of where a workman is working. That obligation is just as absolute as that created by s. 14 of the Act, which imposes

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(1) (1938) 36 L. G. R. 167.

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the necessity that certain machinery shall be securely fenced. The justices have construed this sub-section as if it provided that, in the circumstances specified, an employer should take reasonable steps to secure the safety of the workman. Those are not the words used. The words used are that the employer shall take "effective measures" to ensure a certain result. On the facts shown in this case the respondents did not do that. In my view, there is no defence to this information, and the case should be remitted to the justices with the direction that they should convict.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*
Solicitors for respondents: *Middleton & Co., Sunderland.*

A. W. G.

REX *v.* NATIONAL ARBITRATION TRIBUNAL.

C. A.

1941
July 7, 8, 23.

Ex parte BOLTON CORPORATION.

Emergency legislation—Local government—Officers on war service—Refusal of local authority to make up war service pay to level of civilian remuneration—Reference of dispute by Minister of Labour to National Arbitration Tribunal—" Trade dispute "—" Workmen "—Discretion of local authority—Local Government Staffs (War Service) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 94), *s.* 1, *sub-ss.* 1, 2*—Conditions of Employment and National Arbitration Order,* 1940 (*St. R. & O.* 1940, *No.* 1305), *Part I., art.* 2 ; *Part V., art.* 7*—Industrial Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 69), *s.* 8.

By s. 1 of the Local Government Staffs (War Service) Act, 1939, local authorities are empowered to make up the remuneration of officers who cease to serve them to engage in war service in His Majesty's forces or civil defence to the level of the remuneration which those officers would have received if they had continued in their civil employment, after deducting the amount of their war service pay.

When pressed by the National Association of Local Government Officers on behalf of members who were officers employed by the Bolton corporation, the corporation decided by resolution that they would not exercise in favour of officers who might engage on war service the power given by the Act. Thereupon the association notified the Ministry of Labour that there was in existence a dispute between the corporation and the members of the association employed by the corporation, and the Minister of Labour, acting under the Conditions of Employment and National Arbitration Order, 1940, referred the dispute as a " trade dispute " to the National Arbitration Tribunal constituted under Part I., art. 1, of that order.

The order contains in Part V., art. 7, the following definitions :—" 'Trade dispute' means any dispute or difference between " employers and workmen, or between workmen and workmen " connected with the employment or non-employment, or the " terms of the employment or with the conditions of labour of " any person." " 'Workman' means any person who has entered " into or works under a contract with an employer, whether the " contract be by way of manual labour, clerical work or otherwise, " be expressed or implied, oral or in writing and whether it be a " contract of service or of apprenticeship or a contract personally " to execute any work or labour." These definitions are identical with definitions contained in the Industrial Courts Act, 1919.

On a motion by the corporation for an order prohibiting the tribunal from adjudicating on the dispute :—

Held, that the tribunal had no power to make an award compelling the corporation to make the payments authorized by s. 1 of the Act of 1939 to every officer employed by the corporation who ceased to serve them in order to engage in war service, since the corporation had a discretion in each particular case as it arose, and an order of prohibition must be made.

Per Bennett J. The matter referred to the tribunal was a dispute between the association and the corporation and a difference between a trade union and an employer cannot be a trade dispute within the meaning of Part V., art. 7, of the order. But, even if the dispute could be regarded as a dispute between officers employed by the corporation and the corporation, there was no evidence to show that all the officers were "workmen" within the meaning of Part V., art. 7, and a dispute of which it was not possible to say that the parties to it were employers or workmen was not a trade dispute capable of being referred to the tribunal.

Decision of Divisional Court [1941] 1 K. B. 584 reversed.

Appeal from the Divisional Court (1).

In April, 1940, the Bolton corporation decided not to exercise the power conferred on them by the Local Government Staffs (War Service) Act, 1939, to make to or in respect of those of their employees who had ceased to serve them in order to undertake war service such payments as would, when added to their service pay, represent the remuneration which they would have received if they had continued to serve in their civil capacity. On August 20, 1940, the National Association of Local Government Officers, acting on behalf of such of its members as were employed by the Bolton corporation who had contended that it should be a condition of service of officers in the employment of the corporation that in the event of their serving in His Majesty's forces or in civil defence they should have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation, notified to the Chief Conciliation Officer of the Ministry of Labour and National Service, under Part I., art. 2, para. 1, of the Conditions of Employment and National Arbitration Order, 1940 (St. R. & O. 1940, No. 1305), that there was in existence a trade dispute between the corporation and the members of the association employed by the corporation. On February 4, 1941, the Minister of Labour referred the dispute to the National Arbitration Tribunal set up by the order. The reference came before the tribunal on February 27, 1941, when a preliminary objection was taken on behalf of the corporation that there was not in existence a "trade dispute" within the meaning of the definition contained in Part V., art. 7, of the order, and that, therefore, the tribunal had no jurisdiction. The tribunal took the view that, the matter having been referred to them by the Minister, they could not be called on to determine the question of jurisdiction, which must be decided in the appropriate way in the High Court. They, therefore, adjourned the reference. The corporation, having, on March 3, obtained leave, moved for an order prohibiting the tribunal from adjudicating on the dispute, and they put in a statement in which they set out grounds on which relief was sought as being—(*a*) that the jurisdiction of the National Arbitration Tribunal under art. 2 of the order was limited to adjudicating upon "trade disputes" referred to them; (*b*) that there was no "trade dispute" between the corporation and the claimants within the meaning of arts. 2 and 7 of the order; (*c*) that art. 2 of the order did not apply in the case of officers of a local authority; (*d*) that officers of a local authority were not "workmen" within the meaning of arts. 2 and 7 of the order; (*e*) that the corporation had no power under s. 1, sub-s. 1, of the Local Government Staffs (War Service) Act, 1939, to make up the pay of an officer unless and until he ceased to serve the corporation to undertake war service; (*f*) that the question of making ex gratia payments to a person after he had ceased to serve the corporation was not a question connected with the terms of his employment within the meaning of the definition of "trade "dispute" in the order; and (*g*) that the corporation had no power to determine in advance that they would make up the pay of all their officers irrespective of the circumstances of individual cases and so deprive themselves of the statutory discretion vested in them by s. 1 of the Act of 1939.

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The Divisional Court (Viscount Caldecote C.J. and Tucker J., Atkinson J. dissenting) held that the definition of "workmen" in the order was wide enough to comprise all the officers of the corporation; that, as there was a dispute between employers and workmen, there existed a "trade dispute" within the order; and that the reference to the tribunal was, therefore, intra vires the Minister. The corporation appealed.

Turner K.C. and *Neep* for the corporation.

Sir William Jowitt S.-G. and *Arthian Davies* for the Minister of Labour.

Spens K.C. and *Simes* for the National Association of Local Government Officers.

The arguments were substantially the same as in the court below.

Cur. adv. vult.

July 23. The following judgments were read.

MACKINNON L.J. [after stating the facts:] The statement filed by the corporation under Order LIX., r. 3, sub-r. 2, conveniently takes the place of a statement of claim. That sets out seven grounds on which their claim is based. The majority of the Divisional Court held that none of them was well founded. As regards the first four of them, (*a*), (*b*), (*c*) and (*d*), I do not find it necessary to come to any definite conclusion. I have had the opportunity of reading the judgment that Bennett J. is about to deliver. In that and in the dissentient judgment of Atkinson J. below, there are forcible reasons for a conclusion that, despite the extreme generality of the definitions of "trade dispute" and "workman," imported into the Conditions of Employment and National Arbitration Order, 1940, from the Industrial Courts Act, 1919, this was not a "trade dispute" and the officers of the corporation were not "workmen." It is, however, not necessary for me to consider this branch of the case at greater length or to express a confident opinion thereon, seeing that, on the remaining contentions under (*e*), (*f*) and (*g*), I think that the decision of the Divisional Court was wrong and that this appeal ought to succeed.

A local authority like the Bolton corporation can only expend the ratepayers' money pursuant to statutory authority.

Before 1939 the authority to spend that money in salaries to the members of the applicant trade union was given by s. 106 of the Local Government Act, 1933. That empowered the corporation to appoint officers, and to pay to an officer "such reasonable remuneration as they may determine." It also provided that such an officer "shall hold office during the "pleasure of the" corporation. The enlargement of the power so conferred to make possible payments of the type in question in this case was conferred by the Local Government Staffs (War Service) Act, 1939. It seems to me clear that, on the terms of s. 1, sub-s. 1, of that Act, any decision to make up the war service pay of an employee falls to be made when the particular employee in fact ceases to be employed by the local authority, that is, when he joins the forces. That it also involves the exercise of a discretion by the authority in each case is, I think, also manifest and this is emphasized by the terms of sub-s. 3 of s. 1 and its proviso.

The award which is sought from the National Arbitration Tribunal is one to compel the corporation to agree in advance that every officer who at a future date shall be called up for war service shall ipso facto enjoy the advantage which the corporation are empowered to give him under this Act. As I pointed out during the argument this would have the result that, if there was an officer so unsatisfactory and incompetent that the corporation were minded to dismiss him, but by good luck he was called up for service just before they gave him notice of dismissal, the corporation would be bound to go on making up his remuneration to the amount of his salary to the end of the war. A similar situation would arise in the case of an officer engaged only for a stated period of probation, or an officer who had himself given notice to terminate his employment, if either of them happened to be called to the forces before the expiration of the period of probation or the notice to leave. But the most important thing is that the award would deprive the corporation of their right to exercise their discretion in individual cases.

During the minor conflict from 1914 to 1918 (which we ignorantly called the Great War) certain local authorities passed resolutions to the same effect as that which the Bolton corporation are now being asked to pass. They had no statutory power so to deal with the ratepayers' money and their resolutions were ultra vires: see per Rowlatt J. in *Shipton* v. *Cardiff Corporation* (1). The Local Government (Emergency Provisions) Act, 1916, was, however, passed and it legalized the action of the Cardiff corporation, as was held by Rowlatt J. in *Shipton* v. *Cardiff Corporation* (1) and the same decision was arrived at in this court in *Davies* v. *Rhondda Urban District Council* (2).

It was argued that, if the corporation passed a resolution that they would confer on all their officers the benefits which they are empowered to give by s. 1 of the Act of 1939, that would be valid and intra vires. Reliance for that proposition is based upon the two cases which I have mentioned, and on a dictum of Romer J. in *Aylott* v. *West Ham Corporation* (3). That may well be so, although I think that, if the corporation passed a resolution that they would make up the pay of all their officers who joined the forces, and if any of them was killed or missing would, for the twenty-six weeks permitted by s. 1, sub-s. 3, of the Act, pay to his widow or wife the like sum, irrespective of any pension or other benefit she became entitled to, that would be as much ultra vires as if they declared that they would so pay her for fifty-two weeks or some even longer period, for they would be palpably disregarding considerations which the legislature expressly ordered them to take into account as the custodians of the public money when they enacted the proviso to sub-s. 3 by which "in fixing the sum to be paid under this sub-section, "regard shall be had to any pension or other sum payable to "or for the benefit of the wife or other dependants out of "public or charitable funds."

Even if the corporation, if they thought fit, could pass such a resolution, I fail to understand how that fact can be said to make it legal to order them to do so when they do not think fit. By the Act the corporation is empowered to do or not

(1) (1917) 87 L. J. (K. B.) 51, 53.

(2) (1917) 87 L. J. (K. B.) 166, 167.

(3) [1927] 1 Ch. 30.

to do a certain thing as they think fit. When they say that they do not think fit to do it, I cannot see how an order that takes away their discretion can be justified by saying that they could do it if they liked. The only passage in the judgment of the Lord Chief Justice in which he deals with this, which seems to me the crucial point of the case, is where he says: "I see nothing . . . . in excess of the "powers of the corporation, if they . . . . are required by the "award of the tribunal to bind themselves, in advance, to "make . . . . [these] payments. It is true this means giving "up their discretion . . . . but if a party to a dispute is "forced to submit his case to arbitration, it is very likely that "he will be deprived of a right which he would otherwise have "of deciding the matter in issue for himself." With the greatest respect to the Lord Chief Justice that seems to me to beg the question. The question is: "Can the corporation "be legally compelled to submit this dispute to arbitration?" And the proper answer to it is: "Because such a reference "might deprive them of the discretion which is their legal "right, it ought not to be allowed."

Reference was also made, and reliance placed, on the Emergency Powers (Defence) Acts, 1939 and 1940. It is, in effect, provided by those Acts that an Order in Council under emergency powers may overrule or repeal the provisions of any Act of Parliament. I do not see the relevance of these Acts. The only Orders in Council with which we are concerned are those under which the National Arbitration Tribunal was created. There is no Order in Council in existence which expressly or impliedly cancels the discretionary power of the corporation under the Act of 1939, and directs that they must exercise those powers whether they like it or not. I have no doubt that as regards some of their officers the corporation is bound under the Income Tax Acts to deduct income tax from the salaries they pay them. Suppose the trade union put forward a claim that the corporation must pay all salaries without deducting the tax, and suppose they induced the Minister to refer this dispute to the tribunal. If they could discover any Order in Council which said that a local authority

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must pay salaries without deducting tax no doubt that would overrule the Income Tax Acts and justify the claim, but if there were no such quasi-repeal of the Income Tax Acts, the tribunal obviously could not legally decide in favour of the application. It would be futile to say to the tribunal: "You "exist by virtue of an Order in Council, and the Emergency "Powers (Defence) Acts, 1939 and 1940, say that such an "Order in Council can repeal an Act of Parliament." Because a tribunal is created by an Order in Council, the Acts of 1939 and 1940 do not authorize the tribunal to disregard the provisions of other Acts of Parliament in their decisions.

It has become a commonplace to characterize the present dreadful conflict as a fight for democracy against dictatorship. In this country local government is a prominent form of democracy. Parliament, in its wisdom, has entrusted to the elected representatives of the ratepayers the duty of deciding whether they shall spend the ratepayers' money in a certain manner. Under the Act of 1939 I think that those representatives, and they alone, are clothed with the power so to decide. The order of any other authority or of any tribunal which purports to deprive them of that power is, in my judgment, illegal. Parliament might have ordered local authorities to spend money in this way without any option or discretion on their part, although conceivably the ratepayers might have thought it was hardly fair to order their money to be spent in such a way unless all other employers were ordered to bear a like burden. But Parliament has not so ordered, and in no Act or Order in Council can there be discovered any provision that nullifies the discretion given to the corporation and orders them to do it whether they approve or not. That being so, I think the order of any tribunal compelling them so to act must be without any legal foundation.

This appeal should be allowed with costs here and below and the order for prohibition made.

du Parcq L.J. Tucker J., in his judgment in the Divisional Court, conveniently distinguished the grounds of the application before the court under four heads. As to the first three of the grounds in that classification, although I am disposed to agree with the conclusions of the Lord Chief Justice and Tucker J., I do not find it necessary for the decision of this case to express a final opinion on any of them. In the circumstances, and having regard to the views of my brethren, I think it wise to refrain from so doing. In this judgment I shall deal only with the fourth ground, which Tucker J. stated in the following words: "The tribunal is being asked "to make an award which will compel the corporation con-"tractually to assume an obligation towards its officers as a "whole which it has no power to undertake, it being limited "by statute to making ex gratia payments in its discretion "to officers who have ceased to be in its service."

There can be no doubt that before the Local Government Staffs (War Service) Act, 1939, came into force, that is to say, before "the beginning of the period of the present "emergency," it would have been ultra vires the corporation to make ex gratia payments to officers who had ceased to serve it. That Act expressly empowered the corporation to make to a person engaged in war service who had ceased to serve it payments such as those which are the subject of the claim which has been referred to the tribunal in this case. The corporation is given power and permission, and, therefore, a discretion, to make those payments ex gratia. I agree with the contention of counsel for the corporation that the time for the exercise of that discretion arrives when the officer "ceases to serve" the corporation, and that the corporation ought not to fetter itself in advance by any agreement binding it to make payments which, when the time comes, it may not think proper to make. Circumstances may change between the making of such an agreement and the cessation of the officer's service, and payments which at the earlier date seemed likely to be reasonable may be seen to be wholly unreasonable in the light of new facts. It was suggested at the bar that a promise, contractual in form, made by the corporation to an officer to make such payments in futuro could be treated as part of the "reasonable remuneration" which the corporation is entitled to pay for present services. I think that in most cases this proposition would hardly be maintainable even if the corporation itself determined that such a promise ought to be made. When the corporation has not so determined, it seems to me to be plain that it would be acting illegally if it sought to bind itself by such a promise. It would, therefore, in my opinion, be guilty of an unlawful act if it now agreed to the "condition of service" mentioned in the Minister's reference to the tribunal.

The respondent trade union contends, however, that on the true construction of the Conditions of Employment and National Arbitration Order, 1940, made under reg. 58 AA of the Defence (General) Regulations, 1939, the tribunal, if so advised, may properly make an award which will force this "condition of service" on the corporation as an implied term in its contracts with all its officers, or at least such of its officers as the tribunal may decide to include in its award. This contention obviously raises an important issue. In the argument for the respondents, much reliance was placed on s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939, which provides as follows: "A Defence Regulation, and "any order, rule or bye-law duly made in pursuance of such "a regulation, shall have effect notwithstanding anything "inconsistent therewith contained in any enactment other "than this Act or in any instrument having effect by virtue "of any enactment other than this Act." The language of the Order of 1940 must, no doubt, be read with this subsection in mind, and the respondents contend that if Part I., art. 2, para. 5, of the order is so read, it will be seen that it empowers the tribunal to compel employers or workmen to enter into an agreement even though the effect of some earlier Act of Parliament is to make that agreement illegal. It must be conceded, I think, that the paragraph in effect gives power to the Crown to repeal Acts of Parliament in whole or in part. In theory, at least, what yesterday was an unlawful and even a criminal act may be made lawful to-day by Order in Council. It is not for the courts to seek to curtail powers which Parliament has conferred. If it is plain that provisions of an Act of Parliament have been impliedly repealed by a Defence Regulation it is the duty of the court to disregard those provisions and to give effect to the regulation. It is, however, equally true that, if a regulation can fairly be construed so as to reconcile its provisions with those of earlier legislation, the court should not lean to that interpretation which would treat the earlier legislation as impliedly repealed. It is a well-settled rule that "a repeal by implication is only "effected when the provisions of a later enactment are so "inconsistent with or repugnant to the provisions of an "earlier one, that the two cannot stand together, in which "case the maxim 'Leges posteriores contrarias abrogant' "applies": see the judgment of A. L. Smith J. in *Kutner* v. *Phillips* (1). It is, no doubt, significant that the sub-section on which the respondents rely contemplates that Defence Regulations may repeal earlier Acts by implication, and that sub-section is certainly in striking contrast with s. 3, sub-s. 5, of the Industrial Courts Act, 1919. It is not legitimate to argue that Parliament cannot have intended that provisions in its own Acts should ever be impliedly repealed or modified by a Defence Regulation, since Parliament has clearly foreseen such a possibility. It remains true that there is no presumption in favour of implied repeal, and I am of opinion that the sub-section, fairly construed, has the following result. If it is impossible to reconcile the provisions of a regulation with those of an earlier Act of Parliament, effect must be given to the regulation notwithstanding the Act of Parliament. If it is possible fairly to reconcile the regulation with earlier legislation, s. 1, sub-s. 4, cannot be invoked. In other words, before the sub-section can be brought into play, it must be shown that there is a real inconsistency. It is necessary, therefore, to consider whether the regulation is so inconsistent with the earlier legislation by which the rights of the local authority are limited and their duties are defined that it must be taken to supersede it.

Counsel for the respondents did not shrink from contending that, under the relevant statutory order, it would be open

(1) [1891] 2 Q. B. 267, 271, 272.

to the Minister to refer to the tribunal, and to the tribunal to consider and uphold, a claim on behalf of employers that a statutory minimum wage should no longer be paid, or that the provisions of the Factory Acts as to dangerous machinery should be disregarded in a particular trade. In my opinion, this contention is unsound. It is not necessarily unsound because it leads to a startling result. Whenever extensive powers are given, startling results may follow. It is unsound because it overlooks the canon of construction to which I have referred. An enactment which gives power in general words to make an award which will result in the insertion of a term in a contract is by no means necessarily inconsistent with other enactments which provide that some terms cannot lawfully be inserted in any contract. It is to be presumed, in the absence of some clear indication to the contrary, that there is no intention to legalize what is already, by statute, illegal. When, therefore, an enactment provides in general terms that employers and workmen may be compelled to enter into agreements, it must be understood to mean agreements which are not contrary to law.

In the present case the illegality of what is proposed is perhaps less obvious than it is in the hypothetical instances to which I have referred. " Non-lawyers," said Lord Lindley, "are apt to think that everything is lawful which is not "criminally punishable ; but this is an entire misconception " : see *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ld.* (1). Lord Lindley was speaking of breaches of contract, but what he said is no less true of breaches of statutory duty. By force of previous enactments, the corporation would be acting unlawfully if it did what the National Association of Local Government Officers is claiming that it should be compelled to do. I find nothing in the regulation and order, or the Act under which they are made, which enables me to hold that the tribunal is empowered to compel a subject to enter into an illegal contract. There is, I agree, nothing to prevent the Crown from giving such power to the tribunal. The

(1) [1905] A. C. 239, 253.

question is whether the power has been conferred. In my opinion, it has not.

The Lord Chief Justice dealt with the argument of the corporation under this head by treating their case as analogous to that of an employer who was being deprived of "a right "which he would otherwise have of deciding the matter in "issue himself," and Tucker J. mentions with approval a contention of the Solicitor-General that the corporation has been empowered "to make a present" and so "placed in "the same position as the private individual." This view, in my opinion, does not fully recognize the essential difference between the cases of the local authority and the private individual in respect of such payments as these. Whatever payments a private employer may make to his servants and whatever the motive may be that prompts him to make them, he will not as a general rule be doing what is legally wrong. Local authorities have no right to make payments to their employees otherwise than in accordance with statutory provisions which it is their duty to observe. In the absence of words in an enactment which expressly or by necessary implication authorize them to disregard that duty, it ought not to be held, in my opinion, that they are discharged from the further performance of it.

For these reasons I have come to the conclusion that, if the tribunal entered further on the reference, either it would reject the claim altogether or it would of necessity make an unlawful award and go beyond its jurisdiction. In such a case I am of opinion that an order of prohibition is clearly an appropriate remedy. I agree with the Solicitor-General's contention that, if there were a possibility that the tribunal might, within its term of reference, make a lawful award, it would be wrong to grant prohibition. I do not think that such a possibility exists. Even if the tribunal by its award were to modify the demand of the respondents, for example, by restricting the right to receive the proposed payments to certain officers or classes of officers or by reducing the amount to be paid, it would still, in my opinion, be compelling the corporation to act illegally. There is no via media between rejection of the claim and the making of an award which there is no jurisdiction to make. It follows, in my opinion, that the appeal should be allowed, and the order of prohibition granted.

BENNETT J. I have had the opportunity of reading the judgments that have just been read by my Lord and du Parcq L.J. I agree with them that this appeal should be allowed. I also agree with the reasoning which has led them to that conclusion.

There are, however, some matters on which I should like to add a few words. In the first place, in my judgment it is plain when the minute or order of reference to the National Arbitration Tribunal is read, with the statutory definition of a "trade dispute" in mind, that the dispute which the Minister has referred is not a trade dispute. Reg. 58 AA of the Defence (General) Regulations, 1939, authorizes the Minister of Labour and National Service by order to make provision for, among other matters, establishing a tribunal for the settlement of trade disputes and for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any trade dispute. Clause 4 of the regulation provides that "in this regulation 'trade dispute' has the same meaning "as in the Industrial Courts Act, 1919." The effect of these provisions is to limit and confine the power of the Minister of Labour to establishing a tribunal to deal with a trade dispute which falls within the statutory definition. He cannot, by his order, enlarge the jurisdiction of the tribunal which he is authorized to establish. Any provision in the order which attempted so to do would, in my judgment, be ultra vires.

By Part I., art. 1, of the Conditions of Employment and National Arbitration Order, 1940, the Minister established the National Arbitration Tribunal. By Part V., art. 7, the expressions "trade dispute" and "workman," are defined. Both definitions follow exactly the definitions in the Industrial Courts Act, 1919, as, of course, they were bound to do. I will read the definitions. "'Trade dispute' means any "dispute or difference between employers and workmen, or "between workmen and workmen connected with the employment or non-employment, or the terms of the employment "or with the conditions of labour of any person." "'Work- "'man' means any person who has entered into or works "under a contract with an employer, whether the contract "be by way of manual labour, clerical work or otherwise, be "expressed or implied, oral or in writing and whether it be a "contract of service or of apprenticeship or a contract "personally to execute any work or labour." I now turn back to Part I., art. 2, and I will read para. 1: "If any "trade dispute exists or is apprehended that dispute, if not "otherwise determined, may be reported to the Minister "by or on behalf of either party to the dispute and the "decision of the Minister as to whether a dispute has been "so reported to him or not and as to the time at which a "dispute has been so reported shall be conclusive for all "purposes." There have crept into that paragraph three words which, if they have the effect of enlarging the meaning of the expression "trade dispute" ought not to be there. The three words are "or is apprehended." I am not sure what these words mean. Apprehended by whom? By the Minister, or by some interested or disinterested spectator? Whatever their intention is, it is clear that the Minister has no power to refer to the tribunal a dispute which someone thinks may arise. His only power is to refer an existing dispute.

The facts in the present case which led up to the minute of reference made by the Minister have been stated by my Lord and are set out at length in the affidavit of Mr. Crute, the deputy town clerk of Bolton. He exhibits a copy of a letter dated February 4, 1941, written on behalf of the Minister of Labour to the town clerk of Bolton, in which the town clerk is informed that the Minister has made a minute of reference to the National Arbitration Tribunal. I will read the letter. "Sir, I am directed by the Minister "of Labour and National Service to inform you that the "National Association of Local Government Officers reported "to him by letter on August 21, 1940, a difference between "the association and your corporation. I am to state that "the Minister has accepted the association's letter as a report "of a trade dispute in accordance with the provisions of "art. 2 of the Conditions of Employment and National "Arbitration Order, 1940, and has referred the dispute to the "National Arbitration Tribunal in the terms of a minute, a "copy of which is enclosed. I am to add that a similar "notification has been sent to the National Association of "Local Government Officers." Note the first sentence, the information that " the National Association of Local Govern"ment Officers reported to him . . . . a difference between "the association and your corporation." A difference between a trade union and the employer of labour cannot, on any interpretation of the language of the statutory definition, be a trade dispute. Note the next sentence: " the Minister has "accepted the association's letter as a report of a trade "dispute." The Minister has no power to accept something which is not a trade dispute as a trade dispute and then to refer that something to the National Arbitration Tribunal.

I will now read the minute of reference, which is as follows: "Whereas on August 21, 1940, a trade dispute existing or "apprehended between the National Association of Local "Government Officers on the one hand and the Bolton "corporation, Town Hall, Bolton, on the other hand, was "reported to the Minister of Labour and National Service "(hereinafter referred to as ' the Minister ') by the National "Association of Local Government Officers (being one of the "parties to the said dispute), arising out of a claim that it "shall be a condition of service of officers in the employment "of the corporation that in the event of their service in His "Majesty's Forces or in Civil Defence they shall have made "up to them the difference between their new pay and the "remuneration which they would have received if they had "remained in the actual service of the corporation: Now "therefore the Minister in exercise of the powers conferred "on him by art. 2 of the Conditions of Employment and "National Arbitration Order, 1940, hereby refers the said "dispute for settlement to the National Arbitration Tribunal."

It is, in my judgment, plain that the dispute referred by the Minister is a dispute between the National Association of Local Government Officers, on the one hand, and the Bolton corporation, on the other. It is, in my judgment, equally plain that a dispute between such bodies is not a trade dispute within the meaning of reg. 58 A A, and it follows that the Minister has no power to refer it to the National Arbitration Tribunal, and that that tribunal has no jurisdiction to adjudicate on it.

The point seems to me not to be one of mere form, but of substance. The regulation and the order were made under the provisions of the Emergency Powers (Defence) Acts, 1939 and 1940, and were made to prevent strikes or lock-outs. In the evidence there is no suggestion of the danger of a strike by anyone in the service of the Bolton corporation. On this ground, in my judgment, an order of prohibition ought to be made.

The second matter on which I wish to say a few words arises on the footing that the dispute referred was a dispute between such officers in the employment of the Bolton corporation as were members of the association, on the one side, and the Bolton corporation, on the other. It was so treated in the Divisional Court. Mr. Turner, for the corporation, submitted for the consideration of the court the proposition that a dispute between such parties could not be a trade dispute because it was not a dispute in a trade and that, to satisfy the statutory definition, there must be such a dispute. The foundation of the argument was that a local authority was not engaged in a trade. The learned Lord Chief Justice came to the conclusion, as a matter of construction of the statutory definition, that there was a trade dispute and that all the servants of the corporation were workmen within the meaning of the statutory definition of that term. Atkinson J. decided that officers of a local authority could not be workmen within the meaning of the statutory definition, and that for that reason there was no trade dispute which could be referred to the National Arbitration Tribunal. Tucker J. came to a different conclusion. He came to the conclusion, first, that a

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local authority might be a party to a trade dispute, but secondly, that not all persons in the service of a local authority were necessarily workmen within the meaning of the statutory definition. In the course of his judgment he uses this language: "The affidavit of the deputy town clerk shows that there are "317 'officers' of military age employed by the corporation, "but not engaged on war service. There is nothing to indicate "the nature of the work being performed by these men or "to show that their employment is of such a nature that they "cannot be described as 'persons who have entered into or "'work under a contract with an employer, whether the "'contract be by way of manual labour, clerical work or "'otherwise.' It may be that when this dispute comes before "the tribunal for adjudication, the evidence will show that all "or some of the 317 persons described as 'officers' are not "workmen within the meaning of the definition, and as to "such persons the tribunal will, no doubt, refuse to make any "award, but in my view the mere fact that they are described "as 'officers' is not a sufficient ground upon which this court "can say, at this stage, that it is satisfied that the tribunal "is being asked to adjudicate in a dispute between the "corporation and persons all—or some identifiable number of "whom—cannot be workmen within the meaning of the "definition." Speaking for myself, with all respect to the opinion of the learned Lord Chief Justice, I am not prepared, on the materials at present before the court, to say that, as a matter of the construction of the statutory definition, every servant of a local authority is a workman. The position of such officials as town clerks, medical officers of health, surveyors and persons serving a local authority in that sort of capacity, may be very different from that of persons serving in humbler capacities such as scavengers or tramway car drivers or conductors, if the local authority in question has authority to carry on a tramway undertaking. With regard to the conclusion on this point reached by Atkinson J., I venture, with the most sincere respect for any opinion that he expresses, to doubt whether it is impossible for any person employed by a local authority as an officer to be a workman. It seems to me to be necessary to know all the facts relating to the employment of an officer before coming to a conclusion whether that officer is or is not a workman within the meaning of the statutory definition.

Lastly, with regard to the opinion of Tucker J. that the dispute between the Bolton corporation, on the one side, and such members of the association as are officers of the corporation, on the other, can be referred to the National Arbitration Tribunal as a trade dispute and that the tribunal should separate, so to say, the sheep from the goats, speaking again with the greatest respect, I cannot think this is a right course or a possible course. That a dispute may be a trade dispute, the parties to it must fall within the statutory definition. The dispute is not a trade dispute capable of reference unless they do. In my judgment a dispute between parties whose identity is not disclosed or cannot be ascertained cannot, as a matter of law, be a trade dispute capable of being referred to the National Arbitration Tribunal for the reason that it is not possible to say of such parties that they are employers or workmen as defined by the statute. I agree that the appeal should be allowed.

Appeal allowed.
Order of Prohibition.

Solicitors for Bolton Corporation: *C. E. C. Browne, for Town Clerk, Bolton.*

Solicitor for Minister of Labour: *Solicitor of the Ministry of Labour.*

Solicitors for National Association of Local Government Officers: *J. M. McDonnell, Jackson & Co.*

H. C. G.

1941
July 2.

NATIONAL FARMERS' UNION MUTUAL INSURANCE SOCIETY, LIMITED *v.* DAWSON.

Insurance (Motor)—Third Party Liability—Condition that insured should "use all care and diligence to avoid accident"—Insured driving while under the influence of drink—Claim by third party—Settlement by insurers—Right of insurers to recover from insured damages for breach of condition—Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 12 (*a*).

A policy of motor-car insurance covering the insured and other licensed drivers authorized by him against (inter alia) the third party liabilities required to be covered under the Road Traffic Act, 1930, contained a condition that: "The insured shall keep "every motor-car insured by this policy in an efficient state of "repair, and shall use all care and diligence to avoid accidents "and to prevent loss and to employ only steady and sober "drivers." The insured, while under the influence of drink to an extent which unfitted him to drive a motor-car, drove the insured car on a highway and came into collision with a motor-cycle, causing injury to two persons. Their claim against the insured was settled by the insurers who then sought to recover from the insured the amount so paid by them :—

Held, that the condition in the policy was not one restricting the insurance "by reference . . . . to . . . the physical or "mental condition of persons driving the vehicle" insured within s. 12 (*a*) of the Road Traffic Act, 1934, so as to entitle the insurers to recover from the insured, under the proviso to that section, the sum paid by them to the third parties, but that the condition was not repugnant to the operative part of the policy, and, it having been broken by the insured by his driving while under the influence of drink, the insurers could recover, as damages for the breach, the amount claimed by them.

AWARD stated in the form of a special case.

At all material times there was in force a policy of insurance issued by the National Farmers' Union Mutual Insurance Society, Ld., on May 9, 1938, to Hugh Dawson, insuring him in respect of a motor-car specified therein against (inter alia) third party liability incurred while the motor-car was being driven by the insured or by a licensed driver with his permission. The policy was subject to certain express conditions, which were to be deemed conditions precedent to the insurers' liability. Condition 2 entitled the insurers to "have absolute conduct "and control of all or any proceedings against the insured." Condition 3 (with the marginal note ; "Selection of drivers "and cars") was as follows: "The insured shall keep "every motor-car insured by this policy in an efficient "state of repair, and shall use all care and diligence to avoid "accidents and to prevent loss and to employ only steady and "sober drivers. The Society shall at all reasonable times by "any person authorized by the Society have free access to "examine the insured's drivers and employees and any motor-"car insured under the policy."

Shortly after midnight of September 29-30, 1938, the insured car, while being driven on a public highway by the insured, came into collision with a motor-cycle, the driver of the motor-cycle, Evan Beech, and his pillion passenger, John Procter, suffering personal injuries and damage, while damage to the extent of 34*l.* was caused to the insured car. The collision, injuries and damage were all solely caused by the negligence of the insured, who at the time of the collision was under the influence of alcohol to such an extent as to be incapable of having proper control of a car.

The arbitrator found that at some stage in his consumption of alcoholic liquor the insured knew, or ought reasonably to have known, that any further consumption of liquor was calculated to render him unfit to drive a car with safety on a public highway, but he consumed further liquor, and afterwards drove his car on a public highway. He thereby created a state of affairs that was most likely to result, and did result, in his becoming involved in an accident and causing and suffering loss. The insurers, conceiving themselves to be liable to do so under the Road Traffic Act, 1934 (1), satisfied the claims of Evan Beech

(1) Road Traffic Act, 1934, s. 10, sub-s. 1: "If, after a "certificate of insurance has been "delivered under sub-s. 5 of s. 36 "of the principal Act [Road "Traffic Act, 1930], to the person "by whom a policy has been "effected, judgment in respect of "any such liability as is required "to be covered by a policy under "paragraph (*b*) of sub-s. 1 of s. 36 "of the principal Act [Road "Traffic Act, 1930] (being a liability covered by the terms of "the policy) is obtained against "any person insured by the "policy, then, notwithstanding "that the insurer may be entitled "to avoid or cancel, or may have "avoided or cancelled, the policy, "the insurer shall, subject to the "provisions of this section, pay "to the persons entitled to the "benefit of the judgment any "sum payable thereunder . . . ."

Sub-s. 4: "If the amount

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and John Procter against the insured, to which there was no defence, by the payment of 1009*l.* 13*s.* 11*d.* The insurers sought to recover this sum from the insured.

The arbitrator found that the insured did not use all care and diligence to avoid accidents and to prevent loss, and that his failure to do so was a direct and immediate cause of the collision and of the resulting loss and damage. Unless the facts stated constituted such an " employment " (which the arbitrator did not hold), the insured did not employ, within the meaning of condition 3, any driver who was not steady and sober. If the facts did in law constitute such an employment, then the insured did not use all care and diligence to employ only steady and sober drivers in that he himself drove while under the influence of alcohol and so caused the collision and damage. Subject to the opinion of the court, the arbitrator awarded that the insurers were entitled to recover from the insured 1009*l.* 13*s.* 11*d.*, which he found to be a reasonable and proper sum for the insurers to have paid to settle the action against the insured, and that the insured was not entitled to recover any sum from the insurers in respect of the damage to his car. The grounds of his decision were (*a*) that the insured committed a breach of condition 3, in that he failed to use all

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" which an insurer becomes liable " under this section to pay in " respect of a liability of a person " insured by a policy exceeds the " amount for which he would, " apart from the provisions of " this section, be liable under the " policy in respect of that liability " he shall be entitled to recover " the excess from that person."

Sect. 12 : " Where a certificate " of insurance has been delivered " under sub-s. 5 of s. 36 of the " principal Act [Road Traffic Act, " 1930], to the person by whom a " policy has been effected, so much " of the policy as purports to " restrict the insurance of the " persons insured thereby by " reference to any of the following " matters : (*a*) the age or physical " or mental condition of persons " driving the vehicle . . . . shall, " as respects such liabilities as " are required to be covered by a " policy under para. (*b*) of sub-s. 1 " of s. 36 of the principal Act " [Road Traffic Act, 1930], be of " no effect : Provided that nothing " in this section shall require an " insurer to pay any sum in " respect of the liability of any " person otherwise than in or " towards the discharge of that " liability, and any sum paid by " an insurer in or towards the " discharge of any liability of " any person which is covered by " the policy by virtue only of this " section shall be recoverable by " the insurer from that person."

care and diligence to avoid accidents and to prevent loss; (*b*) that, having regard to the terms and conditions of the policy, the insurers were obliged by s. 12 of the Road Traffic Act, 1934, to satisfy the claims of the injured persons, but that, having regard to condition 3, they were only so obliged by virtue of that section; (*c*) that the sum of 1009*l.* 13*s.* 11*d.* was recoverable from the insured (i.) under s. 12 of the Road Traffic Act, 1934, (ii.) under the terms and conditions of the policy, (iii.) as damages for breach of condition 3 of the policy; (*d*) that the insured, in view of condition 3, was not entitled to recover any sum in respect of the damage to his own motor-car.

B. J. M. Mackenna for the insured. The arbitrator has found for the insurers both on the terms of the policy itself, and under the Road Traffic Act, 1934, but the intoxication of the insured is not a breach of condition 3 of the policy which must be read as limited by the marginal note, "Selection "of drivers and cars," and as only operative in that sphere. To hold that *any* failure to use all care and diligence to avoid accidents is a breach of the condition is repugnant to the operative part of the policy which covers liability for negligence. Even if that submission is wrong, the insured is not liable, as the arbitrator has held, for damages for breach of the condition. A condition in an insurance policy is not a promise by the insured to do something or pay damages. It is a condition of the insurers' liability, the breach of which renders the policy voidable at the insurers' option. If they affirm the policy, as they have done here by exercising their right under condition 2 to conduct negotiations and by agreeing a sum to be paid to the third parties, they affirm it as a whole, and cannot, save where they are given a statutory right, make the insured re-indemnify them in the form of damages. In any event, damages, if recoverable, could not include a voluntary payment by the insurers to the third parties. It may be that the insured would have had no defence to an action by the third parties, but, until that liability is ascertained by judgment, payment by the insurers is a voluntary payment, and, on the ordinary principle of law, cannot be recovered from the person on whose behalf it is made. It is immaterial that the payment was, as the arbitrator found, reasonable. The Road Traffic Act, 1934, does not help the insurers, for s. 10 applies only where a third party has obtained judgment against the insured. Sect. 12 gives no additional rights to a third party. Its effect is merely, where an action is brought under s. 10, to deprive the insurers of certain defences which would otherwise be open to them, and in that case to give them a statutory remedy against the insured. That remedy would be unnecessary if the insurers could sue on the policy for damages for breach of condition. Condition 3, moreover, is not a condition referring to "the age or physical or mental "condition of the person driving the vehicle" and s. 12, on that ground also, has no application.

Samuels K.C. and *P. M. O'Connor* for the insurers. The insurers are entitled to recover from the insured the money paid by them to the third parties. The insured was under the influence of drink and did not use all care and diligence to avoid an accident. Condition 3 is clear and unambiguous, and a condition cannot be held to be repugnant to the operative part of the document in which it is found if a reasonable meaning can be given to it. The insured was clearly guilty of a breach of the condition for if to get drunk and then drive in that state is not a failure to use all care and diligence to avoid accidents, it is difficult to imagine what is. It is contended, not that the condition refers to negligence while a man is actually driving, but that it refers to failure to act reasonably before driving. Drunkenness is a matter of "physical or mental condition," and brings the case within s. 12 of the Road Traffic Act, 1934. The insurers were, accordingly, not entitled as against the third parties to rely on condition 3, but they were, apart from that section, entitled at their option to treat the breach of the condition by the insured either as a breach of a condition precedent or as a breach of a term of the policy sounding in damages. The measure of damages is what the insurers have reasonably paid to the third parties. [They referred to *Concrete, Ld.* v.

Attenborough (1); *Pictorial Machinery, Ld.* v. *Nicols* (2).] Alternatively, the case falling within s. 12, the insurers are entitled, under the proviso to that section, to recover the sum paid by them to the third parties.

Mackenna replied.

VISCOUNT CALDECOTE C.J. The insurers base on s. 12 of the Road Traffic Act, 1934, their claim to recover the sum which they paid to the third parties. They say that they were liable to make a payment to the third parties only by reason of that section. Their contention is that the liability of the insured which they met was only covered by the policy when read without condition 3 which s. 12 requires to be omitted because it purports to restrict the insurance of the insured by reference to the physical or mental condition of persons driving the insured vehicle, that is to say, with reference to their sobriety. Therefore, the insurers argue, the money which they have paid is recoverable under the proviso to the section. The arbitrator found that they were right in this contention, but I do not think that it is sound. The condition does not purport to restrict the insurance by reference to the physical or mental condition of persons driving the vehicle. At most it purports to restrict the insurance from applying to cases where the insured has not used all care and diligence to do the things specified in the condition, and that is something quite different, in my estimation, from a restriction which refers to the physical or mental condition of persons driving the vehicle. The first ground, therefore, fails, and I think the arbitrator's finding on that point was wrong.

The insurers further contend that the sum which they paid to the third parties is recoverable as damages for breach of condition 3 of the policy. In my opinion, that condition can be read as an undertaking by the insured person that he will do the things which it says he shall do, it is contained in the policy as one of the obligations resting on the insured, and the insured has no right to disregard it. Mr. Mackenna has argued that, if the insurers are going to rely on the condition to found a claim for damages for breach of obligation, they must satisfy me that the words of the condition have an intelligible meaning, and that it is not for him, on behalf of the insured, to say what the words mean. The duty of the court is to use every endeavour to find an intelligible and reasonable meaning for every part of a contract of insurance, and, if there is a reasonable meaning which can be found for these words, I must give effect to it. I think that it is possible to give effect to these words without straining them. If the insured chooses to employ a drunken driver, why should he not be held to have broken his contract, and, if damage results from the employment of that driver, why should he not be liable to pay the ensuing damages? So, if the insured does not use all care and diligence to avoid accidents because he sends the car out with no brakes, no horn or no lamps, or utterly unfit in some way or other for use on the road, I think again that he has broken his contract and is liable in damages for the breach. It would seem astonishing to say that he has used all care and diligence to avoid accidents if he, after having consumed so much alcoholic liquor that he is unfit to have proper control over a vehicle on the road, drives a vehicle on the road. In my view, the marginal note on which Mr. Mackenna strongly insisted is an unsafe guide to a proper interpretation of this condition. The condition obviously deals with something more than the "selection of "drivers and cars," and I can see no reason why the insured should be excused from using care and diligence to avoid accidents apart from anything he may do in selecting drivers and cars.

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(1) (1939) 65 Ll. L. Rep. 174.

(2) (1940) 45 Com. Cas. 334.

Mr. Mackenna also submitted that, if condition 3 is read as the insurers would read it, it is repugnant to those parts of the policy which express its main purpose and object, namely, insurance against liability to pay damages to third persons for the negligence of the insured. Similar questions arose in two other cases to which I have been referred—one of them *Concrete, Ld.* v. *Attenborough* (1), a decision of Branson J.—

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(1) (1939) 65 Ll. L. Rep. 174.

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but the circumstances of those cases were different and I do not think that they afford me any guidance in the present matter. In my view, there is no repugnance between condition 3 and the first part of the policy. The insured might use all care and diligence in accordance with the condition and yet be guilty of an act of negligence, or he might fail to use all care and diligence without being found guilty of negligence on the road and so liable to pay damages. The insured himself may never drive his car, and I gather that it is conceded by Mr. Mackenna that in those circumstances the condition might have an intelligible meaning because the insured must use all care and diligence to avoid accidents by seeing that the cars are fit for the drivers he employs. Why should it be said that the mere fact that he drives himself makes the condition inapplicable to his conduct before he stepped into the driver's seat ?

I think that, by this condition, the insured undertakes to use all care and diligence to avoid accidents, not only by selecting proper drivers and cars, but also, if he chooses himself to drive a car, by being in a fit state in which to have control of it on the road. Having regard to the express findings of the arbitrator that the insured did not use all care and diligence to avoid accidents and to the fact that the injuries to the third parties were due to that fact, I think that there was a breach by the insured of the contract into which he had entered, that the payment by the insurers of damages to the third parties was a natural result of that breach, and that the arbitrator was right in the third ground on which he found that the insurers were entitled to recover the amount of that payment from the insured, namely, as damages for breach of the condition.

Award upheld on one ground.

Solicitors for the insured : *Gibson & Weldon, for Bowcock & Pursaill, Leek.*

Solicitors for the insurers : *Nash, Field & Co., for Blewitt & Co., Birmingham.*

J. W. H.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1941.

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